In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1557

NACHMAN CORPORATION,

Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION and INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Nachman Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 23, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. The opinion of the United States District Court for the Northern District of Illinois, which was reversed by the Court of Appeals, appears at 436 F.Supp 1334.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 23, 1979. Jurisdiction of the courts below was based upon 28 U.S.C. §§1331 and 1339, and 29 U.S.C. §1302(b). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the retroactive application of ERISA (as hereinafter defined) to compel employer liability under a lawfully terminated pension plan which did not provide for continued funding in excess of the plan's assets on termination violates the due process clause of the fifth amendment to the United States Constitution.

2. Whether an employer, which lawfully terminated a pension plan prior to the effective date of the minimum vesting and funding standards imposed by ERISA, is compelled to continue to fund the pension plan to provide payments to participants for which the employer was not contractually liable.

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

United States Code, Title 26

§401(a)(7) [prior to amendment by ERISA]

"(7) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that, upon its termination or upon complete discontinuance of contributions under the plan, the rights of all employees to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the amounts credited to the employees' accounts are nonforfeitable."

United States Code, Title 29

§1002(19)

"For purposes of this subchapter:

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title."

§1053(a)

"(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

(A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions. . ."

§1061(b)(2)

"(2) Except as otherwise provided in subsections (c) and (d) of this section in the case of a plan in existence on January 1, 1974, this part shall apply in the case of plan years beginning after December 31, 1975."

§1082(b)(3)

"(3) For a plan year, the funding standard account shall be credited with the sum of—

(A) the amount considered contributed by the employer to or under the plan for the plan year,

(B) the amount necessary to amortize in equal annual installments (until fully amortized)—

(i) separately, with respect to each plan year, the net decrease (if any) in unfunded past service liability under the plan arising from plan amendments adopted in such year, over a period of 30 plan years (40 plan years in the case of a multiemployer plan),

(ii) separately, with respect to each plan year, the net experience gain (if any) under the plan, over a period of 15 plan years (20 plan years in the case of a multiemployer plan), and

(iii) separately, with respect to each plan year, the net gain (if any) resulting from changes in actuarial assumptions used under the plan, over a period of 30 plan years."

§1086(b)

"(b) Except as otherwise provided in subsections (c) and (d) of this section, in the case of a plan in existence on January 1, 1974, this part shall apply in the case of plan years beginning after December 31, 1975."

§1322(a)

"(a) Subject to the limitations contained in subsection (b) of this section, the corporation shall guarantee the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under the terms of a plan which terminates at a time when section 1321 of this title applies to it."

STATEMENT OF THE CASE

This declaratory judgment action[1] arises from the determination by respondent Pension Benefit Guaranty Corporation ("PBGC") that the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, et seq. ("ERISA") compels petitioner Nachman Corporation ("Nachman") to continue to fund a lawfully terminated collectively bargained pension plan despite an express limitation of Nachman's liability to the Plan.

The Plan at issue (the "Nachman Plan") was established in 1960 pursuant to a collective bargaining agreement between Nachman and the International Union, United Automobile Aerospace & Agricultural Implement Workers of America (the "UAW"), which provided that Nachman

[1] Nachman filed a declaratory judgment action against the PBGC alone. The UAW subsequently intervened as a defendant. The case was decided on cross motions for summary judgment.

would contribute to a pension plan a certain number of cents per hour worked for each employee. Under the Plan, Nachman's obligation to make annual contributions to a trust fund was translated into an actuarial formula calculated so that the benefits under the Plan would be fully funded after 30 years if the Plan had not terminated.[2] As acknowledged by the Seventh Circuit, "The parties do not dispute that Nachman complied fully with the funding obligations imposed by the Plan."[3]

The Nachman Plan expressly provided that benefits were payable to participants only if the funds contributed by Nachman and the accumulated earnings thereon were adequate to pay all such benefits:

> "Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. In the event of termination of th[e] Plan, there shall be no liability or obligation on the part of the Company to make any further contribution to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid."[4]

Under its terms, the Plan could be terminated at any time after the collective bargaining agreement expired. The Plan also provided that upon termination, the contributions previously made by Nachman constituted a "complete discharge of the Company's financial obligation."[5]

Prior to ERISA, the applicable provisions of the Internal Revenue Code and Illinois law permitted an employer such as Nachman to terminate a plan and cease contributing. Benefits would then be paid to participants from the funds

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[2] Joint Appendix, pp. 15-21.

[3] Slip Opinion, Appendix p. 2.

[4] Article V, §3 of the Plan, Joint Appendix, p. 39.

[5] Article V, §5 of the Plan, Joint Appendix, p. 37.

already contributed and for which the employer received a deduction on its income tax return. ERISA established a number of requirements for plans to provide truly "nonforfeitable" benefits, i.e., certain benefits could not be forfeited due to early termination of employment, or plan termination, and minimum funding obligations must be undertaken by the employer. ERISA did not, however, require a plan to provide these nonforfeitable benefits upon its enactment in 1974. Instead, the requirement to provide nonforfeitable benefits was phased in to allow employers time to plan appropriate courses of action to deal with the requirements of the new Act. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 249 (1978) discussed at pp. 11-16, *infra*).

Thus, under Title I of ERISA, every plan such as the Nachman Plan was required to be amended by January 1, 1976 to provide that a participant's benefits become nonforfeitable after he completes a certain length of employment. 29 U.S.C. §§1053(a), 1061(b)(2). The first contribution to meet the new minimum funding requirements imposed by ERISA would have been for the year beginning January 1, 1976. 29 U.S.C. §§1082(b)(3), 1086(b).

Relying on this timetable, on October 1, 1975 Nachman, which was closing its plant, gave timely notice to the UAW that it was terminating the Plan effective December 31, 1975. Nachman could not have given such notice sooner because, under the provisions of the Nachman Plan, termination was not permitted during the term of the collective bargaining agreement which expired on October 31, 1975.[6] As the court below acknowledged, "The propriety of the termination is not challenged."[7]

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[6] Article IX, §2 of the Plan, as amended by Amendment No. 3 to the Plan, Joint Appendix pp. 50, 76.

[7] Slip Opinion, Appendix p. 3.

The effect of such termination on Nachman, however, is indeed challenged. Although the parties and the court below conceded that Nachman *could not* have terminated the plan prior to October 31, 1975, and although Congress allowed a grace period to January 1, 1976 to amend such plans to provide that benefits become "nonforfeitable," the Seventh Circuit (reversing the District Court) found (1) that the benefits provided under the Plan, which were expressly conditioned upon sufficiency of Plan assets, were nonforfeitable under ERISA prior to 1976, and (2) that the express terms of the plan had been retroactively amended by ERISA to impose liability for continued funding where no such liability had previously existed, even though the Plan was properly terminated before 1976. The court further held that such an interpretation did not violate the due process clause of the fifth amendment.

The court held, first, that the definition of "nonforfeitable" contained in section 1002(19) of Title I of ERISA applies to the use of that term in Title IV, which governs the PBGC. This is important since Nachman's liability to the PBGC is limited only to the extent the Plan provides nonforfeitable benefits. A claim to benefits is "nonforfeitable" under section 1002(19) only if it "is unconditional, and . . . is legally enforceable against the plan." Although the finding that the section 1002(19) definition applies to Title IV was in accord with the position taken by the District Court and Nachman, the Court of Appeals held that the benefits at issue were "nonforfeitable" under that definition, despite the fact that those benefits were limited by express contract to the assets of the Nachman Plan at termination.

Moreover, the Court of Appeals held that such an interpretation did not offend due process despite the fact that it, (a) created new and expensive obligations on the employer

(which admittedly had complied with all its obligations), (b) ignored the express contractual limitation of liability which was the product of collective bargaining, and (c) imposed this new liability without any chance for the employer to have avoided it under the grace period provisions of ERISA.

REASONS FOR GRANTING THE WRIT

Introduction

The instant case meets three of the five requirements for review by this Court set forth in Supreme Court Rule 19(b). First, the ruling below squarely conflicts with applicable decisions of this Court which hold unconstitutional the retroactive imposition of liability to pay additional compensation for services already rendered and fully compensated. Further, the Seventh Circuit's rationale conflicts with that of the Second Circuit in interpreting the definitional section of ERISA at issue (section 1002(19)). Finally, the statutory issue presented—the definition of "nonforfeitable benefit"—constitutes a critical issue of federal law which should be settled by this Court since, (a) the PBGC insures, and employers are obligated to fund, only such "nonforfeitable benefits,"[8] (b) the issue directly affects at least 12,000 employees and their employers throughout the United States (including the 135 former employees of the plant closed by Nachman),[9] and (c) a uniform approach to this legislation generally is required to guide both the public and private sectors in administering retirement benefit funds which affect practically every working person in this country.

Petitioner contends that the Seventh Circuit's interpretation of ERISA was erroneous and constitutes a violation of the due process right of Nachman and other employers who lawfully terminated pension plans prior to the effective date of the minimum vesting and funding requirements.

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[8] 29 U.S.C. §1322 (a).

[9] Joint Appendix at 138.

I.

THE RULING BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT HOLDING THAT RETROACTIVE IMPOSITION OF LIABILITY IS UNCONSTITUTIONAL.

The Seventh Circuit, in holding that the benefits at issue were "nonforfeitable," concluded that the statute as so interpreted, although admittedly retroactive, did not violate due process. Thus, the court found that Nachman could constitutionally be held liable for continued funding although (a) Nachman had complied with all its obligations under the Plan, (b) Nachman could not have terminated the Plan before it did so, and take advantage of certain grace periods set forth in ERISA, (c) the Plan expressly limited benefits to its assets and limited Nachman's liability to accrued contributions at termination, and (d) the Plan was lawfully terminated prior to the date on which such plans had to be amended to provide for truly nonforfeitable benefits.

This holding directly conflicts with the decisions of this Court in *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935),[10] and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978).[11] In *Alton*, this Court held

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[10] Although the portion of the *Alton* opinion dealing with the commerce clause was overruled in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 230 n.9 (1948), the coordinate holding of *Alton* on the due process limitations imposed on Congress by the Constitution remains in effect and unaltered, as recognized by this Court in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 19, n.18 (1976).

[11] Although the latter case was decided under the Contract Clause, the court below properly noted that "the analysis employed in Contract Clause cases is also relevant to judicial scrutiny of Congressional enactments under the Due Process Clause." Slip opinion, Appendix p. 21.

that Congressionally imposed liability (under the Railroad Retirement Act) requiring the payment of pension benefits based in part on employment prior to enactment of that Act violated due process. The Court rejected the government's argument that Congress, by imposing liability to fund pension benefits based in part on past services, was acting in the best interests of the nation and the railroad industry. The *Alton* Court, in language directly applicable to Nachman's situation, held that by requiring payment "for services long since rendered and fully compensated," Congress had deprived the employers—who had no opportunity to terminate their obligations or increase retroactively their charges to their customers—of property without due process. 295 U.S. at 354.

Similarly, in *Allied Structural Steel,* this Court struck down a Minnesota statute which imposed liability on employers who terminated pension plans for the payment of unfunded benefits to all employees who had worked at least ten years. That statute, the Court ruled, unconstitutionally created a "severe disruption of contractual expectations. . . ." 438 U.S. at 247. Liability for benefits based on services already rendered was imposed on employers who terminated plans immediately after enactment of the Minnesota statute. This Court compared such an impermissible retroactive imposition of liability without an opportunity to avoid such liability to the "gradual applicability of grace periods" which it found were provided by ERISA. 438 U.S. at 247. The ruling of the court below in the instant case, however, effectively rejects the existence of such grace periods and denies Nachman the opportunity to take advantage of them.

The *Alton* and *Allied* cases, along with the numerous lower court decisions following them,[12] stand for the proposition that the Constitution forbids legislation which imposes a new liability on employers to pay additional compensation to its employees for work which has been fully performed and compensated. Further, the cases emphasize the suspect nature of retroactively applied obligations, and reject arguments seeking to justify such legislation on the ground that the legislatures were acting in the public interest.

In rejecting the applicability of the precedent established by this Court in the above cited cases, the Seventh Circuit, although acknowledging the retroactive effect of its interpretation, relied entirely on *Usery* v. *Turner Elkhorn Mining Co.,* 428 U. S. 1, (1976), where this Court upheld Congressional imposition of liability on coal industry employers to compensate employees suffering from black lung disease. That reliance is misplaced. The opinion in *Turner Elkhorn* carefully distinguished *Alton,* and held that retroactive benefits for black lung victims constituted compensation for essentially tortious injury, "to satisfy a specific need created by the dangerous conditions under which the former employee labored." *Alton,* on the other hand, involved an unconstitutional attempt to require increased pension compensation in the nature of additional salary. 428 U.S. at 19. In the instant case, the pension payments imposed

[12]*Fornaris* v. *Ridge Tool Co.,* 423 F.2d 563 (1st Cir. 1970), Rev'd. on other grounds, 400 U.S. 41 (1970); *Fisher & Porter de P.R., Inc.* v. *ITT Hammell-Dahl/Conoflow,* 369 F.Supp. 638 (D.P.R. 1974); *Standard Oil Co. of Louisiana* v. *Poterie,* 12 F.Supp. 100 (E.D. La. 1935).

by the Seventh Circuit are, without question, in the nature of additional salary, and bear no relation to compensation for tortious injury or similar conduct. Clearly, this case should be governed by the principles of *Alton*, and not by those of *Turner Elkhorn*.

Even if this Court were to conclude that the imposition of new liability for past service were permissible, due process requires that Nachman be given the opportunity to avoid that liability. The Court in *Allied*, in striking down the Minnesota statute, criticized its "sudden, totally unanticipated, and substantial retroactive obligation" imposed by the Minnesota statute, and compared it with the gradual applicability of the "[f]unding and vesting requirements [of ERISA which] were delayed for an additional year [to January 1, 1976]. 29 U.S.C. §§1086(b), 1016(b)(2)." 438 U.S. at 249, n.23.

The statutory interpretation of the Seventh Circuit unnecessarily nullifies the grace period emphasized by this Court in *Allied*, by imposing liability for benefits prior to the effective date of the mandatory vesting and funding provisions—a result which, like *Alton* and *Allied*, established a constitutionally impermissible retroactive alteration of employer obligations for additional pension benefits. In reaching its conclusion, the Seventh Circuit mentioned several tests which it believed might apply to the judicial scrutiny of ERISA, as interpreted by that court.[13] The court below concluded that the retroactive imposition of liability on Nachman did not violate due process, mainly because it found "ample evidence that Congress perceived a widespread problem of national importance." (Slip opinion p. 24.) That conclusion is fallacious, because the Seventh Circuit's analysis erroneously presumed that the entire effect of ERISA was being subjected to constitutional scrutiny. In fact, this litigation involves only those plans which terminated prior to the end of the grace period —the first date on which Congress mandated plan amendments to provide for truly nonforfeitable benefits.

[13] Thus, the court below mentioned a "means-end rationality test" (at p. 21), as well as a comparative test requiring an examination of both the problem to be remedied and the "nature and scope of the burden imposed to remedy that problem." (Slip opinion at p. 23.)

Although Congress undoubtedly perceived a "widespread problem of national importance," Congress also, as noted by this Court in *Allied*, allowed phase-in grace periods during which employers could terminate plans without further liability. To hold, as did the court below, that ERISA allowed Nachman no opportunity to terminate its obligations during this grace period, squarely contradicts this Court's holding in *Allied*. Since Nachman terminated its Plan at the first opportunity, and admittedly complied with all of its obligations under the Plan, the entire constitutional rationale of the Seventh Circuit is invalid.

One further important point should be mentioned with respect to the holding of the court below on the constitutional question. The opinion dealt at some length with the issue of respective reliance by Nachman and its employees, concluding that the "employees' reliance interests in vested benefits outweigh the employer's reliance on prior funding." (Slip Opinion at 25.) That startling finding is contrary to the record that the benefits at issue were not promised under the terms of the Plan, but only as the Plan was later affected by ERISA. Moreover, this finding totally ignores the fact that the Nachman Plan was the product of collective bargaining by the employer and the employees, the latter acting through the UAW. Nachman agreed to

contribute a certain sum to the Plan each year during which the collective bargaining agreement was in effect and the UAW agreed that benefits would be limited to the amount of those contributions.

Thus, as this Court recognized in *Allied* (438 U.S. at 246, n.18), the employees clearly had no expectation of benefits which were not provided in the agreement, and thus no "reliance" on the receipt of such benefits. As the District Court held in this case, based on the record, "the advent of ERISA does nothing to disturb the contractual expectations of Nachman or its employees." 436 F.Supp. at 1339. Indeed, any discussion of reliance must be settled in favor of Nachman in light of its lack of any liability to continue funding under pre-ERISA law. Further, to hold that reliance by the employer on the provisions of a duly executed collective bargaining agreement are any less than those of the employees who entered into that agreement violates constitutional doctrine, the National Labor Relations Act, and common sense.

The decision below is constitutionally offensive, contradicts established precedent, and should be reviewed and reversed by this Court.

II.

THE RULING BELOW IS ERRONEOUS AND CREATES A CONFLICT OF RATIONALE AMONG THE CIRCUITS.

In the instant case, although the benefits at issue were expressly conditioned upon sufficiency of assets, the Seventh Circuit held that the benefits were "nonforfeitable" since the benefits were "vested," i.e., the participants had met the required length of service requirements. The Seventh Circuit concluded that since the terms "nonforfeitable" and

"vested" are used interchangeably in much of the legislative history regarding ERISA, the vested benefits under the Plan are nonforfeitable.[14] The Seventh Circuit failed to realize, however, that the terms "nonforfeitable" and "vested" became interchangeable only after all the provisions of ERISA —including the minimum funding and vesting requirements —became effective. Prior to such time, and under pre-ERISA law, vested benefits were nonforfeitable only to the extent funded. 26 U.S.C. §401(a)(7) [prior to amendment by ERISA].

Moreover, the Seventh Circuit decision directly conflicts with the rationale of the Second Circuit in *Riley v. MEBA Pension Trust*, 570 F.2d 406 (2nd Cir. 1977). In *Riley*, the Second Circuit found that a benefit that had vested by the time the employee terminated his employment was in fact forfeitable because it was subject to a condition subsequent—the benefit would be forfeited if the employee competed with his former employer.

Thus, in *Riley*, a "vested" benefit was "forfeitable." Although these two cases arise under different factual settings, the application of the Seventh Circuit's holding in the instant case to the facts of *Riley* would have, without question, resulted in a contrary ruling to that of the Second Circuit on the issue of interpretation of the same statutory provision, section 1002(19).[15] If the Riley plan had terminated before January 1, 1976, the Second Circuit would have held that the employee's vested benefit was not insured because it was forfeitable. The vesting of benefits in the Plan merely established that a participant who terminated his employment before

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[14] Slip Opinion, p. 9, quoting D. McGill, *Preservation of Pension Benefit Rights*, 6 (1972).

[15] The court in *Riley* went on to hold that although the benefit was forfeitable, the employee had not in fact breached the condition subsequent.

retirement age, but after his benefit vested, would still be entitled to receive benefits upon reaching retirement age, provided that assets in the fund were sufficient.

The Seventh Circuit's ruling also conflicts directly with the decision in *A-T-O v. PBGC,* 456 F.Supp. 545 (N.D. Ohio, 1978). In that case, as in the instant case, the employer had terminated a plan, which limited liability to the assets of the fund, prior to the January 1, 1976 effective date of the minimum vesting and funding requirements. The court held that, as it interpreted section 1002(19), the benefits so limited were not nonforfeitable until after that date and, after an extensive review of the legislative history, found that Congress specifically intended to impose the new vesting requirements prospectively, not retrospectively. 456 F.Supp. at 522. Counsel is informed that the *A-T-O* case has been appealed to the Fourth Circuit, but as of this date no opinion has been issued by the reviewing court.

The interpretive issue addressed by the various district courts and courts of appeals is critical to the administration of ERISA since the PBGC insures only nonforfeitable benefits. 29 U.S.C. §1322. Although the PBGC has contended that its own definition of nonforfeitable (29 CFR §2605.6(a)) should take precedence over section 1002(19) for purposes of Title IV, every reported decision dealing with the issue has rejected that position. Only the Seventh Circuit, however, has held that a benefit is nonforfeitable under section 1002 (19) prior to 1976, where liability to pay the benefit was expressly and lawfully limited to the assets of the fund at termination.

In *A-T-O* and the instant case, the lower courts drew extensively on legislative history to bolster their conclusions. Significantly, the Seventh Circuit reached a result diametrically opposite to that reached by the *A-T-O* court, relying on the same legislative history. (See Slip Opinion, pp. 11-13.) These published opinions not only cause confusion in the

manner of approaching the interpretation of ERISA, but cloud the ordinary meaning of the central term "nonforfeitable" which, of course, should govern absent a finding of ambiguity.[16]

The dictionary definition of nonforfeitable is clear: "not subject to forfeiture; cannot lose right to."[17] Since the benefits at issue are strictly limited to the Plan's assets at termination, those benefits clearly were—at least prior to 1976—not nonforfeitable under the common meaning of the term as used in section 1002(19). In short, the benefits were not "unconditional" or "legally enforceable against the Plan" prior to January 1, 1976, on which date plans then in existence were required to be amended to provide nonforfeitable benefits.

The different approaches and conclusions drawn with respect to the definition of nonforfeitable under ERISA require review by this Court.

III.

THIS CASE PRESENTS A CRITICAL ISSUE OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

Based upon the foregoing, the need for a uniform approach to the concept of nonforfeitability under ERISA becomes clear. The issue has been sharpened and reduced by the opinions of the lower courts in the instant case, by the Second Circuit in *Riley* and by the District Court (and soon by the Fourth Circuit) in *A-T-O*.

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[16] *U.S.* v. *Public Utilities Commission of Cal.,* 345 U.S. 295 (1953), *Martin* v. *Hunter's Lessee,* One Wheat (14 U.S.) 304 (1816).

[17] Oxford English Distionary; *See also,* Webster's New Collegiate Dictionary, Funk & Wagnall Standard Desk Dictionary.

To hold, as did the Seventh Circuit, that Congress allowed no grace period in retroactively imposing the new vesting and funding requirements of ERISA constitutes a violation of due process and a disregard for the legislation's phase-in provisions. Too many employees and employers are affected by the sweeping changes mandated by ERISA to allow such a decision to stand.

CONCLUSION

For the foregoing reasons, petitioner Nachman Corporation prays that this court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit for purposes of reviewing and reversing the decision of that court.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

Nos. 77-2146 and 77-2147

NACHMAN CORPORATION,

Plaintiff-Appellee,

v.

PENSION BENEFIT GUARANTY CORPORATION and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 76-C-2963—Abraham L. Marovitz, *Judge.*

ARGUED SEPTEMBER 26, 1978—DECIDED JANUARY 23, 1979

Before CUMMINGS, *Circuit Judge,* WISDOM, *Senior Circuit Judge,** and SPRECHER, *Circuit Judge.*

SPRECHER, *Circuit Judge.* The Pension Benefit Guaranty Corporation and the United Auto Workers appeal from the district court order granting summary judgment in favor of the plaintiff, Nachman Corporation. The lower court granted declaratory relief, limiting Nachman's pension liability to the amounts accumulated in a pension plan trust fund.

* Senior Circuit Judge John Minor Wisdom, of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

APPENDIX

The collectively bargained pension plan contains a clause excluding employer liability by limiting the employees' recourse to the assets of the pension fund. The issue raised on appeal is whether the Employee Retirement Security Income Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1381 (1975), supersedes the employer liability disclaimer and thereby imposes liability for the payment of vested benefits on an employer who, after September 2, 1974, terminates a covered pension plan with insufficient assets. Additionally, Nachman challenges the constitutionality of ERISA if construed to impose liability on employers for vested unfunded benefits. We hold that ERISA does subject the plaintiff to liability for the payment of unconditionally vested benefits effective September 2, 1974 and that this construction does not contravene the Due Process Clause of the Constitution. Accordingly, we reverse the judgment of the district court.

I.

Pursuant to collective bargaining with the UAW, in 1960 Nachman established a pension plan for certain employees at its Armitage Avenue facility in Chicago. The plan terms provided for vesting of benefits after employees fulfilled specified age and length-of-service requirements. This pension plan is characteristic of "defined-benefit" plans, promising a fixed monthly benefit level for each year of service. As is typical of a defined-benefit plan, Nachman was required to make annual contributions to a trust fund on an actuarial basis. Those contributions were calculated by reference to administrative costs of the fund, benefit liabilities accruing during the current plan year ("normal costs"), and the amounts necessary to amortize the past service liability over thirty years.[1] The parties do not dispute that Nachman complied fully with the funding obligations imposed by the plan.

[1] The plan credits an employee for years served prior to the establishment of the plan. "Past service liability" refers to the cost of paying monthly benefits for those years.

On October 1, 1975, Nachman gave timely notice to the UAW that it was terminating the pension plan effective December 31, 1975. The termination accompanied the closing of the Armitage Avenue facility, which had become unprofitable. The propriety of the termination is not challenged.

It is also undisputed that the assets in the trust fund are insufficient to pay all the vested benefits which accrued before December 31, 1975. Apparently the fund assets can provide only thirty-five percent of the accrued vested benefits. Under the terms of the plan, the employees' benefits would be reduced ratably. Nachman would not be obligated to assume liability for the unfunded benefits. Article V, section 3 of the plan provides:

> Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. In the event of termination of th[e] Plan, there shall be no liability or obligation on the part of the company to make any further contribution to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid.

Nachman brought an action for declaratory relief to determine whether ERISA would impose any liability on it for the vested, but unfunded, benefits. The district court granted summary judgment in Nachman's favor, holding that Congress did not intend until January 1, 1976, to subject employers to liability for unfunded benefits which they had disclaimed. Since Nachman terminated the pension plan prior to that date it was not found subject to statutory liability.

II.

In 1974 Congress passed the Employee Retirement Income Security Act (ERISA) in order to establish "minimum standards . . . assuring the equitable character of . . . [private pension] plans and their financial soundness." 29 U.S.C. § 1001(a). ERISA consists of four titles, each designed to correct different abuses perceived in the private pension system. Title I attacks the lack of

adequate "vesting" provisions in many plans. Before ERISA, for example, if a plan did not provide for vesting until retirement, an employee with 30 years of service could lose all rights in his pension benefits in the event that his employment was terminated prior to retirement. Title I establishes minimum vesting standards to ensure that after a certain length of service an employee's benefit rights would not be conditioned upon remaining in the service of his employer. Employers were required to amend the terms of their plans to reflect these minimum standards effective January 1, 1976. *Id.* at § 1053(a). A second area of difficulty was the inadequacy of the funding cycle used by many plans. To improve the fiscal soundness of these pension funds, Title II amends the Internal Revenue Code to require minimum funding. Title III imposes fiduciary responsibilities on the trustees of the pension funds and provides for greater information and disclosure to employee-participants. The final area of concern addressed by ERISA was the loss of employee benefits which resulted from plan terminations. In order to protect an employee's interest in his accrued benefit rights when a plan failed or terminated with insufficient funds, Title IV establishes a system of termination insurance, effective September 2, 1974.

The mechanics of the insurance system established in Title IV control the resolution of this case. Congress created the Pension Benefit Guaranty Corporation (PBGC) within the Department of Labor to administer the termination insurance program. The PBGC guarantees the payment of "nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under the terms of a plan which terminates at a time when . . . this title applies to it." *Id.* at § 1322(a). Prior to the termination by an employer-sponsor of a covered pension plan, a notice of intent to terminate must be filed with the PBGC. *Id.* at § 1341(a). The PBGC then examines the plan and determines whether the assets of the fund are sufficient to pay all benefits guaranteed by the Act. If the assets are sufficient, termination proceeds. If, on the other hand, the PBGC is unable to determine that the assets are sufficient, a trustee is appointed and the guaranteed

benefits are then paid out from the trust assets and, if those are insufficient, from PBGC funds.[2] *Id.* at §§ 1341(c) & 1342(b).

When the PBGC guarantees benefits in excess of the fund assets, the act provides for recovery from the employer-sponsor. *Id.* at § 1362. The amount of the employer's liability is determined by the value of the "plan's benefits guaranteed under this subchapter on the date of termination" offset by the allocable assets of the trust fund. *Id.* at § 1362(b)(1). Liability, however, is limited to a maximum of thirty percent of the net worth of the employer. *Id.*

Nachman's potential liability to the PBGC depends upon whether the employees' vested benefits, unfunded at the date of termination, are "guaranteed" under Section 1322, that is, whether these benefits are "nonforfeitable . . . under the terms of a plan" and the plan termination occurred after the effective date of Title IV, September 2, 1974. If they are so guaranteed, the PBGC must provide them and assess liability against the employer.[3]

It is conceded that the benefits in issue were vested under the terms of the plan. Thus, the precise question before us is only whether the plan term limiting benefit

[2] The PBGC funds are collected through premiums assessed against employer-sponsors and invested in various accounts. 29 U.S.C. §§ 1305-07.

[3] The district court suggested that although Nachman could not be liable to the PBGC for the payment of the benefits, the PBGC might nonetheless be required to provide those lost benefits to the employees. 436 F. Supp. at 1334. Nothing in the statutory language or history of the Act supports this conclusion. The measure of the PBGC's obligation to provide benefits and the measure of employer liability are identical under the Act; that measure is the amount of benefits "guaranteed." 29 U.S.C. §§ 1361-62. The effective date of both sections was September 2, 1974. *Id.* at § 1381(a). Furthermore, the act provides expressly for PBGC assumption of liability without recourse to the employer only for those terminations occurring between June 30, 1974 and September 2, 1974. *Id.* at § 1381(b).

rights to the assets of the fund rendered the rights forfeitable and thus not guaranteed.

Title IV does not provide a definition of "nonforfeitable." However, the word nonforfeitable is used in Title I, the "minimum vesting" sections, as well. Title I requires that after January 1, 1976, every plan must provide that benefits become "nonforfeitable" upon the satisfaction of the minimum eligibility requirements. *Id.* at § 1053(a). The term "nonforfeitable right" is defined for purposes of Title I in Section 1002(19) as

> a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan.

Another definition of nonforfeitable for the purposes of Title IV was promulgated by the PBGC as the administering agency. Benefits are nonforfeitable, and guaranteed, if

> on the date of termination of the plan *the participant has satisfied all of the conditions required of him* under the provisions of the plan to establish entitlement to the benefit, except the submission of a formal application, retirement, or the completion of a required waiting period.

29 C.F.R. § 2605.6(a) (1977) (emphasis added). Nachman's employees have satisfied all conditions required of them. The benefits in issue are therefore clearly "nonforfeitable" if the PBGC definition is employed.[4]

The district court concluded that Nachman employees did not have nonforfeitable rights under the plan. Relying on the definition provided in Title I, the judge concluded that the employer liability exclusion clause in the plan rendered the employee rights both "conditional" and not "legally enforceable" and therefore forfeitable.

[4] The PBGC has relied on this definition in guaranteeing millions of dollars in unfunded benefits disclaimed by employers who terminated plans prior to January 1, 1976. More than 12,000 employees are receiving such benefits from the PBGC.

The court reasoned that since Title I requires that plans be amended to make benefits nonforfeitable, such exclusion clauses could not be operative after January 1, 1976, the effective date of that title. Since the Nachman plan was terminated before Title I took effect, however, the judge concluded the clause retained validity. The court found no contrary legislative intent, relying on the congressional purpose to delay the effective date of the minimum vesting requirements until January 1, 1976. Under the lower court reading of the Act, between September 2, 1974 (the effective date of Title IV) and January 1, 1976 (the effective date of Title I) the PBGC would only be authorized to guarantee benefits which had become vested and had not been disclaimed by the employer under the terms of the plan.

We conclude that ERISA was designed to insure benefits which were vested under the plan terms, without regard to liability exclusion clauses, effective September 2, 1974. Benefits which would only vest by mandate of Title I standards rather than prior plan terms would not be insured until 1976. Since the Nachman plan was terminated after 1974, and since the benefits had admittedly vested under the terms of the plan (without regard to Title I) we hold that Nachman is subject to liability under ERISA. 29 U.S.C. § 1362.[5]

III

We agree with the district court that the definition of "nonforfeitable" provided in Title I should govern the construction of that term's use in Title IV.[6] However

[5] We express no opinion on the amount of that liability. As noted, § 1362 contains a net worth limitation. In addition, the PBGC has the authority to defer § 1362 liability and to make special repayment arrangements. 29 U.S.C. § 1367.

[6] The defendants argue it should not since Title I specifically limits the definitional provisions to that subchapter. 29 U.S.C. § 1002. But we agree with the proposition cited by the lower court that: "[a]n earlier specific definition may properly color a subsequent use of the same words without redefinition." *Kent Mfg. Corp. v. Commissioner*, 288 F.2d 812, 815 (4th Cir. 1961).

unlike the district court, we conclude that the PBGC definition is consistent with the Title I definition. Although the district court's further construction is linguistically plausible, we conclude that the benefit rights of Nachman's employees fit within the Title I definition of "nonforfeitable." Reference to the legislative history and the fundamentals of pension plans in effect before the passage of ERISA illustrates beyond any doubt that the PBGC definition also reflects the construction of the Title I definition intended by Congress.

Under ordinary usage, it may seem illogical to conclude that the Nachman plan provides employees with nonforfeitable benefits when a clause in the plan expressly precludes recovery from the employer in the event the plan terminated with insufficient assets. It certainly appears to be a forfeiture. This is undoubtedly the "illogic" which led the district court below, and the district court in *A-T-O, Inc. v. Pension Benefit Guaranty Corp.*, ... F. Supp. ..... (N.D. Ohio 1978), to conclude the benefits were forfeitable. *But see In re Williamsport Milk Products Co., Inc.*, ... F. Supp. ..... (M.D. Pa. 1978). But as the Second Circuit recently stated in *Riley v. MEBA Pension Trust*, 570 F.2d 406, 408-09 (2d Cir. 1977), "the lower court fell victim to the not uncommon error of reading technical pension language as if it were ordinary English speech."

Notwithstanding the plausibility of the lower courts' construction of "nonforfeitable" another construction is also possible; and it is that construction which we believe to be the correct one. This construction, like the district court's, also derives from the three elements required for nonforfeitability under the Section 1002(19) definition: the "claim" to the benefits must "arise from the participant's service," it must be "unconditional" and it must be "legally enforceable against the *Plan*." (Emphasis added). The benefit claims in issue can be seen to satisfy all three elements. The claims arise from participant service. Second, although the benefit claim is admittedly not legally enforceable against the employer under the terms of the plan, the statute requires

only that the claim be enforceable against the *plan*. Nachman's employees' claims are enforceable against the plan, they simply may not be collectable. Nor is their claim against the plan conditional. All conditions placed upon the participant such as age and length of service have been met. The PBGC definition interprets "unconditional" only as referring to those conditions placed on the participant and not to sufficiency of assets.[7] Satisfaction of the claim is dependent upon sufficient assets, but this should not be viewed as a condition on the claim. Under the pre-ERISA terminology, one author clarified that although benefit claims in fact were conditioned on the availability of funds in the trust, they were not to be considered conditional rights:

> In a basic contradiction to the pure legal concept of vesting, the Benefit under a pension plan that is described as vested, is, in the usual case . . . contingent . . . upon survival . . . [and] upon the availability of assets in the plan. In principle, however, this is no different from some other types of vested property rights such as those embodied in bonds and promissory notes that may not be honored at maturity because of the financial condition of the promisor. In essence, therefore, the vesting of a pension benefit simply means that the realization of the benefit is no longer contingent upon the individual's remaining in the service of the employer to normal retirement age.

D. McGILL, PRESERVATION OF PENSION BENEFIT RIGHTS, 6 (1972). *See also* DEPARTMENTS OF TREASURY AND

[7] Some conditions on vested benefits related to requirements imposed on the participants might render the benefits forfeitable, at least until 1976 when Title I would invalidate such conditions. *See, e.g.*, the benefit rights in *Riley v. MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977). In this case, the vesting was unconditional.

LABOR, STUDY OF PENSION PLAN TERMINATIONS 1972, 19 (1973).[8]

In sum, the definition instructs that nonforfeitability must be measured by the quantum of rights against the plan and without regard to rights against the employer. The liability exclusion clause is therefore irrelevant to a determination of nonforfeitability because it relates only to a claim the employee may have had against an entity other than the plan itself.

Not only does this construction more closely conform to the statute itself, but it is also the only construction substantially supported by the legislative history. Two facts from the legislative history are significant in this regard. First, there is ample evidence that Congress used "vested" and "nonforfeitable" interchangeably and understood the definition of "vest" to mean that benefits would "vest" upon the participant's fulfillment of plan requirements regardless of employer liability exclusion

[8] Prior definitions of nonforfeitable clarify the use of the term "unconditional." H. R. 2 as reported, defined a nonforfeitable pension benefit as a:

> legal claim obtained by a participant or his beneficiary to that part of an immediate or deferred pension benefit, which arises from the participant's service and is no longer contingent on continued service or any other obligation to the employer, sponsoring organization, or other party in interest.

H. R. 2, 93rd Cong., 1st Sess., § 3(19) (1973), reprinted in II LEGISLATIVE HISTORY OF EMPLOYEE RETIREMENT INCOME SECURITY ACT of 1974, 2251-52 (herein LEGISLATIVE HISTORY). *See also* S. 1557, 93rd Cong., 1st Sess., § 3(t) (1973), I LEGISLATIVE HISTORY at 285. Despite a wide variance in the definitions employed in various versions of the act, there is substantial evidence that the object of coverage in this regard never differed. Thus even though this language was replaced, the committee report accompanying H. R. 12906, the bill incorporating definitional language very similar to that eventually passed, clarifies that both definitions were designed to "requir[e] plans to insure unfunded vested . . . [liabilities up to the amounts insured by the Act]." II LEGISLATIVE HISTORY at 3346. *See also* note 10 *infra*.

clauses.[9] Second, the legislative history also shows that Congress enacted Title IV for the specific purpose of guaranteeing benefits that were lost because of employer liability exclusion clauses.

[9] The district court in *A-T-O, Inc. v. PBGC*, ... F. Supp. at ..... concluded that Congress "was aware of the distinction between 'vested' and 'nonforfeitable,'" concluding that "nonforfeitable" encompasses only those vested benefits not disclaimed by the employer. As discussed *infra*, we are convinced that Congress did not understand this to be a difference in the terms.

We find only one statement in the legislative history potentially supportive of this construction of the statute. The district court relied on the following passage in the conference report to conclude that Congress intended to insure only those unfunded, vested benefits for which the employer had assumed liability: "Under the conference substitute, vested retirement benefits guaranteed by the plan . . . are to be covered. . . ." III LEGISLATIVE HISTORY at 4635. The court concluded that if the plan did not guarantee the vested benefits Congress did not intend to guarantee those benefits (until Title I became effective).

Although the sheer weight of the contrary history probably precludes the district court's conclusion, a closer reading of the paragraph cited reveals the propriety of a different inference than that drawn by the A-T-O court. The sentence reports the conference bill resolution of an issue of what variety of vested benefits should be insured. The report explains that the House version of the bill insured only those benefits "required to be vested under the bills minimum vesting standards" while the Senate version insured all benefits which vested by reason of plan terms. We read the quoted sentence as merely explaining that the Senate version was adopted and that vested benefits "guaranteed" by the plan, rather than Title I, would be insured. Thus it is inappropriate to read the word "guarantee" so strictly in a context where limitation-of-liability issues were not under discussion.

There in fact never was a dispute between the bills on the desirability of protecting vested benefits without regard to employer liability exclusion clauses. Senator Williams explained that "the conference substitute, as did the House and Senate bills, establishes an insurance program to protect employees against the loss of vested benefits . . ." without any qualification that those vested benefits be recoverable from the employer under the plan.

(Footnote continued on following page)

Turning to the first important aspect of the legislative history—the interchangeability of Congressional use of the terms "vested" and "nonforfeitable"—it must be realized that "vested" had a clear meaning which determined the meaning of its corollary term, "nonforfeitable." It had been commonly understood that benefits would "vest" even when the plans contained employer liability exclusion clauses. *See McGill, supra* at 6. The Nachman plan itself is illustrative, providing for the "vesting" of benefits upon satisfaction of age and service requirements, despite the inclusion of the exculpatory clause in the plan. Thus the substitution of the word "vested" for the word "nonforfeitable" in the statutory language further clarifies that Title IV guarantees benefits not contractually guaranteed by the employer.

The definitional substitution is entirely appropriate. There is overwhelming evidence that the words vested and nonforfeitable were in fact used synonymously in this regard by Congress.[10] Even though the Act uses the

[9] *continued*

The district court in *Nachman*, on the other hand, apparently recognized that the words were used interchangeably throughout the Act, but nonetheless concluded that Congress used the word "vested" to describe unfunded benefit rights enforceable against the employer. We refuse to presume, without supporting legislative history, that Congress used this standard pension term to mean something other than its accepted definition. The legislative history, as discussed, indicates traditional usage of the term "vested."

[10] In fact, in the reported version of S.4 the word vested was used where the word nonforfeitable now appears. See S.4, 93rd Cong., 1st Sess., § 402(a) (1973), I LEGISLATIVE HISTORY at 389. The substitution of terms might be explained by reference to the testimony of members from the Department of Labor at the hearings. The Department testified in 1973 that "there is a problem of defining the accrued benefit which will be insured. . . . [W]e probably need to get some consistency between accrued benefits definition for purposes of Internal Revenue as well as for purposes of termination insurance." *Hearings before the Subcommittee on Private Pension Plans of the Senate Committee on Finance*, 93rd Cong., 1st Sess., Part I at 437. Senator Bentsen responded

(Footnote continued on following page)

word "nonforfeitable," various committee reports as well as remarks of members invariably state that Title IV insures "vested" benefits.[11] During the hearings Senator Bentsen specifically stated that "[t]he risk we are talking about insuring is the vested interest of the participants." *Hearings before the Subcommittee on Private Pension Plans of the Senate Committee on Finance*, 93d Cong., 1st Sess., Part I at 443 (1973). The words "nonforfeitable" and "vested" appear interchangeably in the dialogue of the history throughout all stages of the legislation.[12] For example, in discussing the minimum

[10] *continued*

with some interest in consistent definitions, although emphasizing it was vested benefits Congress intended to insure. *Id.* at 443. The Internal Revenue Code used the word "nonforfeitable," rather than "vested," in its regulation of plan terminations pre ERISA. *See* Treas. Reg. § 1.401-6 (1963).

Alternatively it is conceivable that "nonforfeitable" was preferred to "vested" to clarify that benefits guaranteed by Title IV must have vested unconditionally during the period before Title I's restrictions on vesting conditions went into effect. *See* note 7 *supra*.

Moreover, the committee reports reveal clearly that although the statutory language was altered, the intent remained constant. In S. 1179, the first Senate bill to use the term "nonforfeitable," the accompanying committee report explained that insured benefits were those "vested . . . under the plan." S. REP. NO. 93-383, I LEGISLATIVE HISTORY at 1094.

[11] The conference report on Title IV was explained as preventing the loss of "vested benefits." III LEGISLATIVE HISTORY at 4741 (1976) (remarks of Senator Williams). *See also* H. REP. NO. 93-533, II LEGISLATIVE HISTORY at 2349; S. REP. NO. 93-383, LEGISLATIVE HISTORY at 1094, 1149. *See also* the remarks of Representative Drinan, III LEGISLATIVE HISTORY at 3590 ("The Bill . . . would prevent anyone who has a vested pension benefit from losing benefits because of plan failure for any reason.").

[12] In one Senate Report reference is made to "vested (*i.e.*, nonforfeitable) rights." S. REP. NO. 93-383, I LEGISLATIVE HISTORY at 1112. Both House and Senate Reports refer to "the *term* 'nonforfeitable right' or 'vested right' " (Emphasis on the singular form added). H. REP. NO. 93-533, II LEGISLATIVE HISTORY at 2357, S. REP. NO. 93-127, I LEGISLATIVE HISTORY

(Footnote continued on following page)

funding standards the Senate Committee noted that the "presently vested [benefits] . . . represent the nonforfeitable rights of the employees." S. REP. No. 93-383, I LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT SECURITY INCOME ACT OF 1974 (hereinafter LEGISLATIVE HISTORY), at 1090. In another Senate Report it was explained that "[o]ne of the major private pension plan considerations centers around the concept of vesting. Vesting refers to the nonforfeitable right or interest which an employee acquires in the pension fund." S. REP. No. 93-127, I LEGISLATIVE HISTORY at 594.

The second significant aspect of the legislative history supporting our construction of "nonforfeitable" is even more direct: the purpose of Title IV was to guarantee benefits that might be lost because of employer liability disclaimers. We must note initially that construing ERISA, as did the court below, to cover only instances in which the employer assumed liability for incompletely funded plans would import so narrow a purpose to Congress as to make the enactment of Title IV almost meaningless.[13] Congress was certainly aware of the fact that the standard private pension plan prior to ERISA

[12] *continued*

at 602. Senator Williams explained the conference bill as assuring every employee the attainment of "nonforfeitable or 'vested'" rights in a pension. III LEGISLATIVE HISTORY at 4734. *See also* H.R. 462, 93d Cong., 1st Sess., § 3(26) (1973), II LEGISLATIVE HISTORY at 75, setting out the definition of "'nonforfeitable right' or 'vested right.'"

[13] Again the district court found that these benefits would have become insurable under Title I effective in 1976. Title I, however, would have no effect on this problem since it was only directed at ensuring unconditional vesting under the plan. As discussed *supra*, it has been traditionally true that benefits can be unconditionally vested and still unrecoverable because of asset deficiencies. Throughout the history it is emphasized that Title I requirements would not ensure the employee of actual receipt of vested benefits—only Title IV could do that. *See, e.g.*, S. REP. No. 93-383, I LEGISLATIVE HISTORY 1093-94.

disclaimed employer liability.[14] Additionally, under this construction the congressional urgency behind Title IV would reasonably have to be further narrowed to reach only the instances where the employer was *both* liable for plan deficiencies *and* insolvent. (Otherwise insurance would be generally unnecessary). There is no question that terminations often result because of some financial difficulty. However, the Treasury-Labor Study of pension plan terminations, on which Congress relied heavily, revealed that only three per cent of employees who suffered benefit losses in 1972 worked for employers with a net worth less than the employee benefit losses. DEPARTMENTS OF THE TREASURY AND LABOR, STUDY OF PENSION PLAN TERMINATIONS 1972, 61 (1973). Further, seventy-one percent of the employees who suffered losses were employed by a firm with a net worth of at least 1,000 times greater than the benefits lost. *Id.* Therefore Congress clearly perceived the employer liability exclusions as the source of the losses and the

[14] Both legislative and non-legislative sources confirm that the employer rarely assumed liability for underfunding of the plans pre-ERISA. SEE S. REP. No. 92-634, 92nd Cong., 2nd Sess. at 74 (1971), II LEGISLATIVE HISTORY at 3479 (remarks of Rep. Annunzio); II LEGISLATIVE HISTORY at 3388-89 (remarks of Rep. Erlenborn). *See also*, A STUDY OF THE TERMINATION OF UAW PENSION PLANS reprinted in *Hearings on H. R. 1269 before the Subcommittee on Labor of the House Committee on Education and Labor*, 92nd Cong., 1st Sess. at 164 (1972); GREENOUGH AND KING, PENSION PLANS AND PUBLIC POLICY 194 (1976); D. MCGILL, FULFILLING PENSION EXPECTATIONS 112, 240 (1962) (stating that "except for unusual situations, the employer is under no *legal* liability to monitize the benefits credited under a pension plan." (Emphasis in original).

Evidence in the record here suggests that 78 of the 136 plans terminated before January 1, 1976 contained limitation of liability clauses similar to the one in the Nachman plan, a figure representing a lower percentage than these sources suggest has been traditionally true. This evidence does not reveal however whether some of the terminated plans used various other forms of indirect disclaimers instead of the standard clause. *See* MCGILL, FULFILLING PENSION EXPECTATIONS, *supra*, at 88-89.

problem to be remedied.[15] As early as 1971, the Senate Subcommittee on Labor had concluded:

> The need for or desirability of insurance arises because of the numerous contingencies which can result in . . . termination. . . . Employers ordinarily have no financial responsibility for pension payments beyond the contributions they are committed to make.

INTERIM REPORT OF ACTIVITIES OF THE PRIVATE WELFARE AND PENSION PLAN STUDY, SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, SUBCOMMITTEE ON LABOR, 92nd Cong., 2nd Sess., 74 (1971).

There is, however, no need to infer such a narrow purpose to Congress since in fact Congressional representatives definitely believed that Title IV of ERISA had been written to insure the benefits which employers had declined to guarantee. It was definitively stated during the floor debates in both the House and Senate, that the termination insurance, had it been in force in 1960, would have insured the vested benefit losses of the employees of the South Bend Studebaker plant. II LEGISLATIVE HISTORY at 1639 (Remarks of Senators Bentsen and Javits); III LEGISLATIVE HISTORY at 4694 (remarks of Rep. Brademas).[16] Those losses resulted because the plan disallowed recourse to the employer's assets.[17]

[15] This is further evident from the repeated expressions of intention to insure all the vested benefit losses reported by the 1972 Treasury-Labor Study. As noted, almost all of the losses reported involved solvent employers. II LEGISLATIVE HISTORY at 1635-36 (remarks of Sen. Bentsen).

[16] The Studebaker losses were of the greatest magnitude and were frequently cited as representative of the need for termination insurance, *see* S. REP. NO. 93-383, I LEGISLATIVE HISTORY at 1093-94, 1146-47; II LEGISLATIVE HISTORY at 1665-66 (remarks of Sen. Taft); II LEGISLATIVE HISTORY at 3373-74 (remarks of Rep. Brademas).

[17] *See* the remarks of Willard Solenburger, HEARINGS ON PRIVATE PENSION PLANS BEFORE THE SUBCOMMITTEE ON FISCAL POLICY OF THE JOINT ECONOMIC COMMITTEE, 89th Cong., 2nd Sess., 126, 127 (April 27, 1966).

Therefore, it is beyond doubt that the vested benefits of Nachman's employees are guaranteed by Title IV. The lower court suggested that even if the benefits were guaranteed Nachman would not be liable. As discussed *supra*, Section 1362, subjecting employers to liability for all guaranteed benefits, prohibits this conclusion. Moreover, the legislative history confirms that Section 1362 was intended to impose liability on employers for the benefits they had disclaimed contractually. Although the primary concern of the legislature was to guarantee benefits to workers, it was determined that imposition of liability on the employer would be essential to prevent abuse.[18] Title IV was not merely a subrogation scheme as the district court suggested. It was recognized as imposition of the very liability employers had previously refused to assume.[19] Nowhere does this appear more clearly than in the remarks of the opponents of Title IV. Five Congressmen supported a bill to delete Title IV

[18] *See* S. REP. NO. 93-383, I LEGISLATIVE HISTORY at 1155; II LEGISLATIVE HISTORY at 1873 (remarks of Sen. Griffin); II LEGISLATIVE HISTORY at 3382 (remarks of Rep. Gaydos), stating that employer liability was necessary to "prevent a solvent employer from terminating a plan and transferring the amount of the unfunded vested liabilities to the [PBGC]. Absent this procedure the solvent employer would be able to renege on his agreement to contribute to the plan with impunity."

[19] *See* GREENOUGH, *supra* at 194:

> Until the 1974 act . . . the financial obligation of a pension trust was limited to the actual assets of the plan; there was no recourse beyond the limit for those to whom benefits had been promised but for whom the liability had been insufficiently funded. Under the new pension law, the gap between the employer and the pension plan has been bridged. If the PGBC has had to pay benefits to vested participants upon plan termination, employers are liable for reimbursing the insurance corporation for insurance benefits paid. . . .
>
> The new termination insurance provisions constitute a recognition in public policy that an employer who establishes a pension plan cannot thereafter isolate himself from the financial consequences of the promises made. The reform was long overdue.

(significantly not Title I) from the act because they objected to its intent to "change the contract of the employer from a promise to make certain contributions to a fund to a promise to pay the pension supported by a pledge of the employer's assets." H. REP. NO. 93-533, II LEGISLATIVE HISTORY at 2387-88 (supplemental views of Representatives Quie, Ashbrook, Erlenborn, Eshleman and Hansen).[20] Congress provided that Title IV take effect on September 2, 1974, to ensure "prompt and effective protection." III LEGISLATIVE HISTORY at 4742 (remarks of Sen. Williams). Senator Williams explained the need for the September 2, 1974 effective date:

> Probably one of the most difficult problems confronted by the Congress was the selection of effective dates for the insurance program, and here both Senate and House conferees worked diligently to arrange a structure of effective dates that would bring the insurance protection generally into effect as quickly as possible. This was done in recognition of the fact that depressed economic conditions in certain regions created the possibility that a number of plans were in critical straits and were terminating or were likely to do so imminently. Lack of immediate protection for beneficiaries in these cases involved workers who had earned . . . pensions notwithstanding the new provisions of the bill which have a delayed effective date.

Id. at 4766. To hold that the unconditionally vested benefit rights of Nachman's employees are not insured under the Act would totally subvert the Congressional intent. Since the benefits are guaranteed under the Act, Nachman is subject to liability under Section 1362.

[20] *See* Representative Erlenborn's lengthy explanation of his opposition to this result during floor debates and the vocal disagreement of other members of the House. II LEGISLATIVE HISTORY at 3388-89, 3390, 3393, 3396, 3399-3400. *See also* Representative Annunzio's remarks in support of termination insurance on the grounds that "it is unconscionable that an employer is presently under no legal obligation to make good on his pension promise." II LEGISLATIVE HISTORY at 3479.

IV

Nachman argues that Congress cannot constitutionally impose retroactive liability for the payment of unfunded, vested benefits under the Due Process Clause. U.S. CONST. Amend. V. The Plaintiffs rest their claim of unconstitutionality principally on the Supreme Court's decisions in *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330 (1935) and *Allied Structural Steel Co. v. Spannus*, 46 U.S.L.W. 4887 (June 28, 1978). The defendants argue that the liability imposed should be characterized as prospective, but that even if retroactive, this exercise of legislative power is reasonable and constitutional under the Supreme Court decision in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

The Supreme Court has confirmed that Congress has broad latitude to readjust the economic burdens of the private sector in furtherance of a public purpose. Only if Congress legislates to achieve its purpose in an "arbitrary and irrational way" is due process violated. *Usery v. Turner Elkhorn Mining Co., supra*, at 15; *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 46 U.S.L.W. 4845, 4851 (June 27, 1978). *Turner Elkhorn Mining* also instructs however that it is not necessarily true that "what Congress can legislate prospectively it can legislate retrospectively," 428 U.S. at 16. Judicial scrutiny of a statute must therefore include an assessment of the rationality of the retroactive effects as a means to achieving the Congressional purpose.

Title IV of ERISA does affect Nachman retroactively. The defendants argue that since ERISA only requires employers to assume liability for pension benefits which become due upon terminations after the effective date of the Act, it assesses liability prospectively. This argument, however, relates only to the degree of retroactive impact. Although it is true that the statute applies only to prospective terminations, it also applies retrospectively to invalidate exclusion-of-liability clauses in pension plans agreed upon prior to ERISA. Thus to the extent that ERISA invalidates Nachman's otherwise valid acts which occurred prior to enactment, it is retroactive. *See*

generally Allied Structural Steel Co. v. Spannus, 46 U.S.L.W. 4887, 4891 (June 28, 1978).[21]

The Congressional purpose in enacting Title IV of ERISA was to protect employees from the loss of vested benefits when a pension plan terminates with insufficient funds.[22] Nachman does not argue that this end itself exceeds Congressional regulatory power. Instead, the specific question presented for review is whether the imposition of retroactive liability on employers is an arbitrary and irrational means of achieving this end.

The success of Nachman's position ultimately must rest on the applicability of several Supreme Court precedents. Recently, the Supreme Court in *Allied Structural Steel* invalidated a Minnesota statute assessing liability on employers for the payment of unfunded benefits upon the termination of a private pension plan. Upon termination, covered employers were required to purchase deferred annuities sufficient to provide full pensions to all employees who had worked at least ten years. *Allied Structural Steel Co.* terminated a pension plan after the effective date of the Act with insufficient funds. The plan provided benefits for employees retiring after having served the company for a prescribed period, in no case less than fifteen years, and contained an exclusion of liability clause. Nine of the eleven employees discharged did not have any vested pension rights under the plan since they had not fulfilled the minimum service requirements. However, these employees had been in the company's employ for ten years and were therefore entitled to benefits under the Minnesota statute.

The Supreme Court found the employer could not be held to the liability imposed by the statute. The Court reviewed the statutory scheme and found it constitutionally insufficient, concluding that the legislature

[21] To be wholly prospective, Title IV of ERISA would have to apply only to pension plans established after the effective date of the act. *See* Hochman, *"The Supreme Court and the Constitutionality of Retroactive Legislation,"* 73 HARV. L. REV.

[22] As discussed *supra*, this was the explicit Congressional purpose.

had made "no showing . . . that this severe disruption of contractural expectations was necessary to meet an important general social problem." 46 U.S.L.W. at 4891. Although decided under the Contract Clause, which is applicable only to state legislation, several authorities have suggested that the analysis employed in Contract Clause cases is also relevant to judicial scrutiny of Congressional enactments under the Due Process Clause. *Allied Structural Steel Co. v. Spannus*, 46 U.S.L.W. at 4894, 4895 note 9 (dissenting opinion); *Veix v. Sixth Ward Building & Loan Association*, 310 U.S. 32, 41 (1940); *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 448 (1934). *See also Hochman, supra* note 19, at 695; Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 852, 890-91 (1944). Both employ a means-end rationality test. However, since we are convinced that ERISA withstands the scrutiny employed under the Contract Clause cases, we need not decide whether the two clauses in fact impose identical restraints on legislative impairment of contracts.

A second Contract Clause case,[23] *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934), relied upon in *Allied Structural Steel Co.*, may also be cited as support for Nachman's position. In *Worthen*, the Court invalidated Arkansas legislation exempting all life insurance from creditor attachment. The debt was incurred, judgment was obtained, and the writ of garnishment was issued, prior to the enactment of the legislation. The Court held that this limitation upon the means of enforcing a contract impaired the obligation of contracts and therefore could be justified only if it was enacted "in order to meet public need because of a pressing public disaster" and was "limited by reasonable conditions appropriate to the emergency." *Id.* at 433. Applying these standards, the Court was unable to ascertain a public need sufficiently

[23] In another recent decision, *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the Supreme Court invalidated state legislation under the Contract Clause. The Court applied a more stringent level of scrutiny to a state's impairment of its own contracts than is required for laws impairing private contracts, 431 U.S. at 22-23, thus rendering it inapplicable to this case.

broad to justify an act containing "no limitations as to time, amount, circumstances, or need." 292 U.S. at 434.[24]

In *Railroad Retirement Board v. Alton Railroad,* 295 U.S. 330 (1935), the Supreme Court invalidated under the Due Process Clause a federally imposed compulsory retirement and pension system for all carriers subject to the Interstate Commerce Act. The Act required employers to pay the cost of retirement pensions for all workers presently in their employ as well as for those workers who had terminated employment in the year prior to enactment. Whether the purpose of the legislation was viewed as a legislative effort to improve efficiency, safety or the retirement security of workers,[25] the Court found it was arbitrary to achieve these ends through the "imposition of liability to pay again for services long since rendered and fully compensated," 295 U.S. at 354, and violated Due Process.

The defendant, on the other hand, relies principally on the Supreme Court's decision in *Usery v. Turner Elkhorn Mining,* 428 U.S. 1 (1976). There the Court upheld Congressional imposition of liability on coal industry employers to compensate employees suffering from black lung disease. The challenged provision subjected employers to liability for injury to employees who had terminated employment prior to the effective date of the Act. The Court resolved that Due Process was satisfied because the legislation represented "a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor. . . ." 428 U.S. at 18.

[24] It is interesting to note that the beneficiary of the life insurance in the case, wife of the deceased, had been a partner in the business for which the credit was obtained, illustrating the over-inclusive protection afforded.

[25] A majority of the court found that this purpose—general improvement of retirement security—exceeded the scope of Congressional power under the Commerce Clause. 295 U.S. at 362. *But see id.* at 374 (dissenting opinion). We do not understand the plaintiff here to raise this objection.

Application of the factors relevant to judicial assessment of rationality, as distilled from these and other precedents, indicates that Title IV of ERISA satisfies Due Process. Rationality must be determined by a comparison of the problem to be remedied with the nature and scope of the burden imposed to remedy that problem. In evaluating the nature and scope of the burden, it is appropriate to consider the reliance interests of the parties affected, *Allied Structural Steel Co.,* 46 U.S.L.W. at 4890-91; *Adams Nursing Home of Williamstown, Inc. v. Mathews,* 548 F.2d 1077, 1080-81 (1st Cir. 1977); whether the impairment of the private interest is effected in an area previously subjected to regulatory control, *Allied Structural Steel Co.,* 46 U.S.L.W. at 4891, *Federal Housing Administration v. The Darlington, Inc.,* 358 U.S. 84, 91 (1958); the equities of imposing the legislative burdens, *Alton Railroad,* 295 U.S. at 354; *Turner Elkhorn Mining,* 428 U.S. at 19, and the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. *W.B. Worthen Co.,* 292 U.S. at 434; *Allied Structural Steel Co.,* 46 U.S.L.W. at 4891. It must be emphasized that although these factors might improperly be used to express merely judicial approval or disapproval of the balance struck by Congress, they must only be used to determine whether the legislation represents a rational means to a legitimate end.[26] *See Turner Elkhorn Mining,* 428 U.S. at 18-19.

Congress determined that each year somewhere in the vicinity of 20,000 workers lost vested pension benefits due to causes beyond their control when a pension plan terminated.[27] Given that workers had "anticipated" that these vested benefits would provide retirement security, Congress viewed the termination losses as an abuse of the private pension system in need of correction. 29

[26] Although explicit consideration of these factors might suggest a risk of judicial usurpation of properly legislative judgments, failure to consider them might ultimately result in no meaningful scrutiny of the legislative process—a result prohibited by the Due Process Clause.

[27] *See* text and notes *supra* at 14-16 and note 32 *infra.*

U.S.C. § 1001(a). Thus, unlike the record before the Supreme Court in *Allied Structural Steel Co.*, here we have ample evidence that Congress perceived a widespread problem of national importance.[28]

An analysis of the retroactive burden imposed suggests that unlike the legislation in *Allied Structural Steel Co.*, *Worthen* and *Alton Railroad*, the burdens imposed by ERISA are rationally related to the Congressional purpose. It is true that the monetary measure of Nachman's potential liability cannot be characterized as insubstantial.[29] Further, Title IV of ERISA does displace reliance interests of the employer. If the employer had known that he would be liable for funding the insufficiencies upon termination of the plan, the company either would not have established the plan or perhaps would have utilized a more accelerated funding

[28] In *Allied Structural Steel Co.* the Court objected to the "extremely narrow focus" of the Minnesota statute. 46 U.S.L.W. at 4891. Moreover, the Court found the "only indication of legislative intent in the record" was represented by the Minnesota legislature's concern with one plan termination by White Motor Corp. *Id.* Finally the Court also notes that the Minnesota legislation had an extremely short effective life, since it was to become void on the effective dates of ERISA. *Id.* at 4891 n.21. This time limitation further belies the narrowness of the legislative purpose. None of these defects in the Minnesota scheme are applicable to ERISA.

Although the loss of pension benefits was not considered a national emergency by Congress, *Allied Structural Steel Co.*, confirms the prior precedents holding that retroactive liability can properly be imposed to remedy problems which fall short of an emergency. *Id.* at 4891 n.24.

[29] The Supreme Court in *Allied Structural Steel Co.*, stated that "[m]inimal alteration of contractual obligations may end the inquiry at its first stage" under a Contract Clause analysis. 46 U.S.L.W. at 4890. The record evidence indicates that the average benefit subject to guarantee for Nachman's employees is $77 per month. The assets of the fund are only sufficient to provide an average monthly benefit of $27, thus subjecting Nachman to potential liability for amortizing the average benefit of $50 per month for 135 employees.

schedule.[30] In *Allied Structural Steel Co.*, the Supreme Court emphasized the gravity of altering an employer's obligation "in an area where the element of reliance was vital—the funding of a pension plan." 46 U.S.L.W. at 4891. However, the nature of the reliance interests in this case can be distinguished in several respects. First, the Minnesota statute imposed liability for payment of benefits to employees who, since they had not fulfilled service requirements, had no vested rights under the plan. Thus the Minnesota employer had a far greater reliance interest displaced than the only reliance displaced by Title IV—the belief that the company would not be liable for funding deficiencies in the event of a plan termination. The Minnesota employer had not funded the plan to ever accommodate payment of benefits upon completion of only ten years service, as the Act now required. This is the only reliance element emphasized by the Supreme Court in *Allied Structural Steel Co.*—an element not present in this case.[31]

The second and more important distinction in the nature of the reliance interests is that in this case Congress found that the employees' reliance interests in vested benefits outweighed the employer's reliance on prior funding. In *Allied Structural Steel Co.*, the Supreme Court specifically stated that, "[i]n some situations the element of reliance may cut both ways," but that "Minnesota did not act to protect any employee reliance interest demonstrated on the record." 46

[30] *See* D. McGill, Fulfilling Pension Expectations 276 (1962), concluding that if an employer were subject to liability for the payment of unfunded benefits, "sound financial management and realistic accounting practice would call for the funding on a current and actuarially determined basis of benefit credits not yet vested"—a practice apparently not typical of plans excluding employer liability upon termination.

[31] This aspect of differentiation with *Allied Structural Steel Co.*, will be eliminated for terminations which occur after December 31, 1975, since the minimum vesting requirements of Title I will then be in effect. We need not consider the constitutionality of Title I in this case since it is inapplicable here.

U.S.L.W. at 4891 n.18. The Supreme Court was unwilling to speculate that employees without any vested rights under the plan had any substantial reliance interests. Title IV, however, protects the reliance interests of employees in benefit rights which had vested under the pension plan, an interest which, *prima facie*, is stronger than interests in unvested rights. Moreover, this reliance interest is in fact demonstrated on the legislative record. Congress found that employees' expectations for retirement security were being defeated by plant closings and other causes beyond their control.[32] The third and final distinction in the reliance interests is that the expectation of the employer may also rationally be given less weight by Congress since pension plan terminations had previously been subject to federal regulation,[33] another element notably missing in *Allied Structural Steel Co.* 46 U.S.L.W. at 4891.

The basic equities of imposing the liability has also been relevant to the determination of whether the burden is irrational. In *Allied Structural Steel Co.*, and *Alton Railroad* the Court emphasized that the employer was being forced to pay added compensation for fully

[32] The following paragraph represents perhaps the most succinct explanation contained in the Congressional record:

> Concern for loss of benefits by workers after long years of labor through circumstances beyond their control was similarly expressed by President Richard M. Nixon on December 8, 1971, when, in a message to the Congress he said, "When a pension plan is terminated, an employee participating in it can lose all or part of the benefits which he has long been relying on, even if his plan is fully vested. . . . Even one worker whose retirement security is destroyed by the termination of a plan is one too many."

II LEGISLATIVE HISTORY at 3296.

[33] The Internal Revenue regulations imposed numerous requirements on the format of private pension plans necessary to obtain favorable tax treatment. Included in those regulations was the mandate that all funded benefits be made nonforfeitable simultaneous with plan termination. Treas. Reg. § 1.401-6 (1963).

compensated services. The employers received no benefit in the bargain. In *Alton Railroad* the employer had never agreed to pay any retirement benefits. In *Allied Structural Steel Co.* the employer had agreed to pay retirement only if the employee served him for the requisite period of time—a time period not satisfied by nine of the eleven employees terminated. As the Supreme Court has noted, "the 'true nature' of the pension payment is a reward for length of service." *Alabama Power Co. v. Davis*, 431 U.S. 581, 593 (1977). Here, however, Nachman received the benefit he bargained for. The Nachman employees entitled to ERISA benefits in this case served Nachman for the requisite number of years required by the company under the terms of the plan and thus conferred the full benefit on the employer. In this case, then, the question Congress answered was not merely who should provide workers with retirement income, but who should bear the costs of a plan termination: a solvent employer who has received the full benefit he bargained for or the employee with vested benefit rights. As in *Turner Elkhorn Mining*, it was reasonable for Congress to conclude that this liability represented "an actual, measurable cost of . . . [the employer's] business." 428 U.S. at 19.

Perhaps the most important facts distinguishing ERISA from the Minnesota statute in *Allied Structural Steel* are those revealing the Congressional attempt to moderate the impact of the liability imposed. Title IV provisions represent a rational attempt to impose liability only to the extent necessary to achieve the legislative purpose. Congress concluded that it was necessary to insure unfunded vested benefits and established a federal corporation for that purpose. However, it was also determined that it would not be possible to maintain an effective insurance program without imposing some liability on employers. The abuses employer liability was designed to cure included terminations motivated by a desire to avoid the continued burden of funding.[34] III LEGISLATIVE HISTORY at 4741 (remarks of Sen. Williams); II LEGISLATIVE HISTORY at 3382 (remarks of Rep. Gaydos). Congress was also concerned that without

[34] *See* text and notes *supra* at 14-16.

the risk of liability, employers might use promises of higher retirement benefits for bargaining leverage, knowing that the PBGC would be required to fulfill the promise. S. REP. NO. 93-383, I LEGISLATIVE HISTORY at 1155. It was also believed that to impose liability would cause employers to assume a more responsible funding schedule. II LEGISLATIVE HISTORY at 1873 (remarks of Sen. Griffin). These first two considerations would not have been relevant in the Minnesota scheme because no agency was established to assume primary responsibility for the payment of benefits.

Acknowledging that employers on the verge of bankruptcy would be unlikely to terminate pension plans solely to take advantage of termination insurance, Congress provided net worth limitations on the amount of potential liability. 29 U.S.C. § 1362. Congress also devised other provisions to temper the burdens imposed. Employers will not necessarily be liable for the full amount of benefits promised in the plan, since Congress set a level on the amount of benefits guaranteed. 29 U.S.C. § 1322(b)(3). In Section 1323 Congress required the PBGC to provide optional insurance to an employer who desires to protect against this contingent liability.[35] Finally, Title IV grants the PBGC discretion to arrange reasonable terms for the payment of liability. 29 U.S.C. § 1367. Thus Title IV of ERISA, unlike the statutes invalidated under Due Process or the Contract Clause does have "limitations as to time, amount, circumstances, [and] need." *W.B. Worthen*, 292 U.S. at 434.

The record supporting the enactment of ERISA, wholly unlike that present in *Allied Structural Steel*, demonstrates that "the presumption favoring 'legislative judgment as to the necessity and reasonableness of a particular measure' " *must* be allowed to govern here. 46 U.S.L.W. at 4891. *Turner Elkhorn Mining*, 428 U.S. at

[35] This protection would not have been available to Nachman since such insurance would have had to be in effect for 60 months. 29 U.S.C. § 1323(d).

18, 19; *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). Title IV of ERISA satisfies Nachman's rights to Due Process.

The order of the district court is reversed.

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1557

NACHMAN CORPORATION,
Petitioner,

—v.—

PENSION BENEFIT GUARANTY
CORPORATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED
APRIL 12, 1979
CERTIORARI GRANTED JUNE 18, 1979

INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

1976

August 9	Filed Complaint.
October 21	Filed Motion of Defendant Pension Benefit Guaranty Corporation to Dismiss Complaint
October 21	Filed Memorandum in Support of Motion of Defendant Pension Benefit Guaranty Corporation to Dismiss Complaint.

1977

January 12	Filed Plaintiff's Memorandum in Opposition to Motion to Dismiss.
January 28	Filed Reply of Defendant Pension Benefit Guaranty Corporation to Plaintiff's Memorandum in Opposition to Motion to Dismiss.
March 25	Enter Order dated March 24, 1977 denying Defendant's motion to dismiss.
April 5	Filed International Union, United Automobile, Aerospace and Agricultural Implement Workers of America's motion to intervene.
April 5	Filed UAW's memorandum in support of motion to intervene.
April 15	Filed Plaintiff's Memorandum in Opposition to Motion of United Auto Workers to Intervene.
April 25	Filed Nachman Corporation's Motion for Judgment on the Pleadings or for Summary Judgment.

May 5	Filed Reply Memorandum of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) in Support of its Motion to Intervene as a Party Defendant.
May 6	Filed Response of Defendant Pension Benefit Guaranty Corporation to Motion to Intervene.
June 9	Enter Order dated June 9, 1977 granting Motion of UAW to Intervene.
June 16	Filed Intervenor-Defendant's UAW's cross-motion for summary judgment.
June 16	Filed Intervenor-Defendant's UAW's memorandum in support and response.
June 16	Filed Affidavit of Robert Kryvicky.
June 16	Filed Motion of defendant Pension Benefit Guaranty Corporation for summary judgment, including Affidavit of Joseph E. Ellinger.
June 23	Filed Plaintiff's reply memorandum in support of its motion for judgment on the pleadings or for summary judgment and in opposition to motions of defendant and intervening defendant for summary judgment.
September 16	Enter Order and Memorandum Opinion dated September 15, 1977, granting Plaintiff's motion for summary judgment and denying Defendants' cross-motions for summary judgment.
September 16	Enter Rule 58 Judgment.
October 7	Filed UAW Notice of Appeal.
November 17	Filed PBGC Notice of Appeal.

1979

January 23	Filed Opinion of Court of Appeals.
January 23	Filed Judgment Order of Court of Appeals.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 76 C 2963

NACHMAN CORPORATION
an Illinois corporation,

Plaintiff,

vs.

PENSION BENEFIT GUARANTY CORPORATION
A body corporate established within the United States Department of Labor,

Defendant.

COMPLAINT

Filed August 9, 1976

Now comes Nachman Corporation, an Illinois corporation, by Selwyn Zun, Lawrence R. Levin, Robert W. Gettleman and Joel D. Rubin, its attorneys, and as its complaint against the Pension Benefit Guaranty Corporation, a body corporate established within the United States Department of Labor pursuant to 29 U.S.C. §1302, states as follows:

1. Nachman Corporation (''Nachman'') is an Illinois corporation having its principal place of business in Chicago, Illinois. The Pension Benefit Guaranty Corporation (the ''PBGC'') is a body corporate established within the United States Department of Labor which is granted, among other things, all the powers conferred on a nonprofit corporation under The District of Columbia Nonprofit Corporation Act. The matters here in controversy exceed, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000). Juris-

diction of this court is founded upon 28 U.S.C. §§1331 and 1349, and 29 U.S.C. §1302(b).

2. Nachman for many years carried on a portion of its manufacturing business at 4560 West Armitage Avenue, Chicago, Illinois (the "Chicago North Plant"). Certain of the hourly employees of Nachman employed at the Chicago North Plant elected the United Automobile, Aircraft and Agricultural Implement Workers of America (the "UAW") as their collective bargaining agent. As part of the collective bargaining agreement for the period commencing November 1, 1958, Nachman and the UAW agreed to establish a pension plan and Nachman contracted to "fund a sum equal to six cents (6¢) per hour for each employee in the unit which is the subject of this Collective Bargaining Agreement into a Pension Plan, the details of which shall be drawn up and mutually agreed to between the Company and the Union....." Nachman formally entered into a pension plan with the UAW on February 29, 1960 (the "Retirement Plan"). Successor collective bargaining agreements have increased the amount that Nachman was to fund into the Retirement Plan. The Retirement Plan has been amended from time to time but none of the amendments effect the substantive issues presented by this action. A copy of the relevant provisions of each collective bargaining agreement between Nachman and the UAW, commencing with the 1958 agreement and including the final agreement in 1972 (which expired October 31, 1975) and the Retirement Plan with all amendments thereto are attached hereto, marked Exhibits A and B respectively and incorporated herein. The plan year of the Retirement Plan is the calendar year.

3. The Retirement Plan provides for four types of retirement benefits:

(a) *Category A*—An employee with 10 or more years of continuous service with Nachman who terminates his employment after age 65 is eligible for a monthly benefit during

his lifetime equal to a sum certain multiplied by such retired employee's years of continuous service;

(b) Category B—An employee with 10 or more years of continuous service with Nachman who terminates his employment between the ages of 60 and 65 is eligible for the benefit set forth in Category A commencing upon his attaining age 65 or an amount equal to such benefit reduced by 6/10ths of 1% for each month between the date payment commences and the date upon which he would have attained age 65 in either case provided he is living on the date payment commences;

(c) Category C—An employee with 15 or more years of continuous service who becomes disabled is eligible for a disability benefit subject to certain conditions not applicable here; and

(d) Category D—An employee with 15 or more years of continuous service with Nachman who terminates his employment between ages 45 and 60 is eligible for a benefit equal to a sum certain multiplied by such employee's years of continuous service, such benefit to commence upon his attaining age 65 provided he is then living and has made application therefor no earlier than 60 days prior to his 65th birthday and no later than his 70th birthday.

4. Article IV, Section 2 of the Retirement Plan provides:

"The Company agrees to contribute to the Fund as its obligation hereunder for each Plan Year an amount as determined by the Actuary equal to the least of the following amounts:

(a) The sum of the following:

(1) The normal costs of providing the benefits under the Plan;

(2) The portion attributable to such Plan Year of the amount required to fund in full on a level basis over a 30-year period the accrued liability on the Effective Date; plus

(3) The estimated amount necessary to cover such administrative costs as are payable from the Fund for such Plan Year;

or

(b) The maximum amount that is deductible for Federal Income Tax purposes for the taxable year of the Company ending with or within such Plan Year." (Exhibit B, p.15).

5. Article IV, Section 5 of the Retirement Plan provides:

"Payments by the Company to the Trustee of the contributions determined under Sections 1 [the initial $1,000 contribution] and 2 of this Article shall be in complete discharge of the Company's financial obligation under this Plan. The Company will cause the Board [the administrator of the Plan] to be furnished with a certificate of the Actuary at least annually, as to compliance with the funding requirements contained herein." (Exhibit B, p.16).

6. Nachman has contributed to the Trust Fund under the Retirement Plan sufficient amounts to discharge its obligations under its collective bargaining agreements with the UAW and under Sections 1 and 2 of Article IV of the Plan.

7. Article V, Section 3 of the Plan provides in part:

"Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. In the event of termination of this Plan, there shall be no liability or obligation on the part of the Company to make any further contributions to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid." (Exhibit B, p.18).

8. Section 1 of Article IX of the Retirement Plan permits amendment of the Plan to comply with the Internal Revenue Code and federal and state law but in no case is any modification or amendment permitted which would change the amount Nachman is required to contribute under the Plan.

9. Section 2, Article X of the Retirement Plan provides in part:

"In the event that either party desires to terminate this Agreement and Plan, it shall give the other party 90 days

prior written notice thereof, which notice may be served at any time during the negotiations referred to in Section 3 of Article IX [which can only commence after August 31, 1975], or at any time after August 31, 1975, whichever time is earlier." (Exhibit B, p.30).

10. Pursuant to Article X, Section 2 of the Retirement Plan, Nachman delivered notice to the UAW on October 1, 1975 of its intention to close the Chicago North Plant and to terminate the Retirement Plan effective December 31, 1975 and the Retirement Plan was so terminated.

11. Under the Retirement Plan the assets in the Trust Fund on December 31, 1975 were sufficient to pay benefits to all those present and former employees who were eligible on or before the date of termination of the Retirement Plan to receive a normal or early retirement benefit (Category A and B, respectively); however, the assets were and presently are insufficient to pay employees who, on the date of termination, had completed 15 years of continuous service but were not eligible to receive retirement benefits under Categories A and B.

12. Prior to the effective date of the Employee Retirement Income Security Act of 1974 ("ERISA"), the only applicable law relating to retirement plans was the Internal Revenue Code of 1954, as amended, 26 U.S.C. §§1 et. seq., (the "IRC"). The IRC prior to amendment by ERISA: (i) did not require any benefit to be paid to employees who terminated prior to retirement; (ii) permitted benefits which were being paid to retired employees to be defeasible under certain circumstances; and (iii) provided that upon termination of such retirement plan an employer need not be liable for the benefits set forth in the plan, except to the extent such benefits could be satisfied with the assets existing in the trust fund of the plan on the date of termination.

13. ERISA requires that retirement plans in existence on January 1, 1974 be amended for plan years commencing after December 31, 1975 to provide a "nonforfeitable" benefit to

employees who terminate their employment prior to retirement if such employees have completed certain minimum service requirements. ERISA further prohibits forfeiture under any circumstances of any benefit which becomes "nonforfeitable" under the terms of the plan, unless such benefit is more liberal than ERISA requires.

14. Title IV of ERISA (29 U.S.C. §§1301 et. seq.) creates the PBGC, provides that, beginning June 30, 1974, the PBGC will guarantee the payment of all "nonforfeitable" benefits under the terms of the Plan (subject to certain limitations which are not material to the issues presented in this Complaint), and further creates a right of subrogation against the employer sponsoring the plan.

15. "Nonforfeitable" as used in ERISA is defined as follows:

"The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." 29 U.S.C. §1002(19).

16. On December 17, 1975 Nachman, pursuant to Section 4041(a) of ERISA (29 U.S.C. §1341), notified the PBGC of Nachman's intention to terminate the Retirement Plan effective December 31, 1975. The notice stated that the assets of the Plan are less than the accrued value of the benefits provided in the Retirement Plan and that since the benefits under the terms of the Plan are unconditional and legally enforceable only to the extent funded and are, therefore, *not* "nonforfeitable" as such term is defined in ERISA, there is no liability on the part of Nachman to the PBGC.

17. Nachman is not liable to the PBGC for any amounts which would be required to continue to fund the benefits provided under the Retirement Plan as set forth in paragraph 3 hereof since:

(a) Under the collective bargaining agreements with the UAW, Nachman was obligated to fund only a certain amount per hour for each employee;

(b) The Retirement Plan provides that upon termination benefits are to be paid only to the extent they are funded;

(c) The PBGC guarantees, and can claim by way of subrogation against the employer, only benefits which are "nonforfeitable";

(d) The benefits under the Retirement Plan for which the assets are insufficient are not "nonforfeitable" (as defined in ERISA) for the following reasons:

(i) The benefits under the terms of said Plan are unconditional and legally enforceable only to the extent they are funded; and

(ii) such benefits were not required to be provided and, in any event, if provided, were not required to be made "nonforfeitable" prior to December 31, 1975;

(e) Retirement plans in existence on January 1, 1974 were not required to provide "unconditional and legally enforceable" benefits until the plan year commencing after December 31, 1975, the date the Retirement Plan was lawfully terminated;

(f) Regardless of whether the PBGC determines that it should guarantee the payment of benefits in excess of the amounts funded to date, no rights exist against Nachman since the benefits in question were not "nonforfeitable"; and

(g) To subject Nachman to liability on the grounds that ERISA changed the terms of—

(i) its collective bargaining agreement with the UAW before Nachman was able under such collective bargaining agreement and under the Retirement Plan to terminate such Plan, and

(ii) the Retirement Plan before such Plan was required by law to amend its substantive provisions to conform with ERISA,

would violate Nachman's rights under Article I, Section 10 and the Fifth Amendment to the United States Constitution.

18. The PBGC failed to determine whether the assets of the Retirement Plan are sufficient and on March 31, 1976 requested Nachman to extend the 90-day period during which the PBGC was to determine such sufficiency for an additional 120 days.

19. The PBGC has, pursuant to Section 4041(e), 29 U.S.C. §1341, internally determined that the Retirement Plan is unable to pay all basic benefits under such Plan when due, and seeks reimbursement from Nachman. Representatives of Nachman have met with officials of the PBGC and have denied liability for the reasons set forth in this complaint. However, unless enjoined by this court, the PBGC will issue a deficiency notice under Section 4042, 29 U.S.C. §1342. Officials of the PBGC have orally notified Nachman that if a formal deficiency notice is issued under Section 4042, 29 U.S.C. §1342, Nachman will lose its right to fund the deficiency over an extended period of time, or in the alternative, its ability to purchase commercial annuities to fund the retirement benefits (the cost of which is less than funding the liability through the PBGC). As a result Nachman requested an extension to August 31, 1976 in order that it would have sufficient opportunity to file this complaint before the PBGC issues its formal deficiency notice.

20. There exists an actual and present controversy between the parties hereto as to their rights and liabilities under the Plan and ERISA, requiring adjudication by this court pursuant to 28 U.S.C. §§2201 and 2202.

WHEREFORE, Nachman prays for Judgment as follows:

1. Declaring that Nachman has no liability under Section 4062 of ERISA, 29 U.S.C. §1362, for any funding deficiency under the Retirement Plan;

2. Enjoining, preliminarily and then permanently, the PBGC from issuing a deficiency notice under Section 4042, 29 U.S.C. §1342, until this court has ruled on Nachman's request for a declaration of its liability under Section 4062 of ERISA, 29 U.S.C. §1362; and

3. For such further relief as the court may deem proper.

Respectfully submitted,

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ROBERT W. GETTLEMAN
JOEL D. RUBIN

By: ROBERT W. GETTLEMAN
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STATE OF ILLINOIS } ss.
COUNTY OF COOK }

VERIFICATION

Lawrence W. Newman being first duly sworn, on oath, deposes and says that he is the Treasurer and Controller of Nachman Corporation, plaintiff herein, that he has read the foregoing Complaint, and that upon his personal knowledge, the allegations set forth therein are true.

LAWRENCE W. NEWMAN
Lawrence W. Newman

Subscribed and sworn to
before me this 3rd day
of August, 1976.

Notary Public

Complaint Exhibit A

PENSION PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT

ARTICLE XVII
(Effective November 1, 1958 through October 31, 1961)
Pensions

The Company and the Union agree that all employees in the unit covered by this Collective Bargaining Agreement shall be covered by a Pension Plan to be implemented in the following manner:

The Company will fund a sum equal to six cents (6¢) per hour for each employee in the unit which is the subject of this

Collective Bargaining Agreement into a Pension Plan, the details of which shall be drawn up and mutually agreed to between the Company and the Union. This funding to commence when the Pension Plan has been formulated and has received United States Treasury approval.

ARTICLE XVII
(Effective November 1, 1963 through October 31, 1966
Pensions

The Company and the Union agree that the existing Pension Plan covering all employees in the collective bargaining unit shall be continued during the term of this Agreement subject to the following modification:

Effective November 1, 1964, the Company will fund an additional one cent (1¢) per hour for each employee in the bargaining unit for the purpose of providing additional pension benefits.

Effective November 1, 1965, the Company will fund an additional one cent (1¢) per hour for each employee in the bargaining unit for the purpose of providing additional pension benefits.

ARTICLE XVII
Effective November 1, 1966 through October 31, 1967)
Pensions

The Company and the Union agree that the existing Pension Plan covering all employees in the collective bargaining unit shall be continued during the term of this Agreement subject to the following modifications:

Effective November 1, 1964-65, the Company will fund an additional one cent (1¢) per hour for each employee in the bargaining unit for the purpose of providing additional pension benefits.

ARTICLE XVII
(Effective November 1, 1967 through October 31, 1970)
Pensions

The Company and the Union agree that the existing Pension Plan covering all employees in the collective bargaining

unit shall be continued during the term of this Agreement subject to the following modifications:

Effective November 1, 1964-65, the Company will fund an additional one cent (1¢) per hour for each employee in the bargaining unit for the purpose of providing additional pension benefits.

ARTICLE XVII

(Effective November 1, 1970 through October 31, 1972)

Pensions

The Company and the Union agree that the existing Pension Plan covering all employees in the collective bargaining unit shall be continued during the term of this Agreement, subject to the following modification:

Effective November 1, 1970, the Company will fund an additional one cent (1¢) per hour for each employee in the bargaining unit for the purpose of providing additional pension benefits. Effective November 1, 1971, the Company will fund an additional one and one-half ($1\frac{1}{2}$¢) per hour for each employee in the bargaining unit for the purpose of providing additional pension benefits.

ARTICLE XVII

(Effective November 1, 1972 through October 31, 1975)

Pensions

The Company and the Union agree that the existing Pension Plan covering all employees in the collective bargaining unit shall be continued during the term of this Agreement, subject to the following modification:

Effective November 1, 1972, the monthly pension benefit provided for employees retiring on or after November 1, 1972, shall be $3.25. Effective November 1, 1973, the monthly pension benefit provided for employees retiring on or after November 1, 1973 shall be $3.50.

[Complaint Exhibit B]

NACHMAN CORPORATION (CHICAGO PLANT) AGREEMENT AND PENSION PLAN

This Agreement entered into the 29th day of February, 1960, at Chicago, Illinois, by and between Nachman Corporation, an Illinois Corporation (herein called the "Company"), and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW) affiliated with AFL-CIO, and its Local 1003 (herein called the "Union").

ARTICLE I

ESTABLISHMENT OF PLAN—INTERNAL REVENUE APPROVAL

1. The Nachman Corporation (Chicago Plant)—UAW Pension Plan (herein called the "Plan") is hereby established, subject to the provisions of this Agreement, for the purposes of providing old age and disability retirement income security to employees of the Company covered hereunder.

2. Promptly after the execution and delivery hereof, the Company, at its expense, shall file an application (together with all necessary supporting data) with the Internal Revenue Service for a ruling or determination to the effect that (a) this Plan meets the requirements of Section 401 of the Internal Revenue Code of 1954, (b) the trust under the Trust Agreement (hereinafter specified) is entitled to exemption under Section 501 of the Internal Revenue Code of 1954 and (c) contributions to the Fund (hereinafter specified) will be deductible from gross income under Section 404 of the Internal Revenue Code of 1954, subject to verification and examination of the Company's income tax returns.

3. This Plan shall become effective on the first day of the month in which the favorable ruling or determination letter

issued by the Internal Revenue Service in response to such application, is made pursuant to Section 2 of this Article I.

ARTICLE II
DEFINITIONS

The terms defined in this Article for all purposes of this Plan shall have the respective meanings hereinafter set forth:

Actuary—An actuary, designated by the Company, who is a member of the Society of Actuaries, or a firm of actuaries, designated by the Company, at least one of whose members is a member of the Society of Actuaries.

Bargaining Unit—The group of employees for which the Union has been recognized as the sole and exclusive bargaining agent pursuant to Article IX, Section 1 of the "Collective Bargaining Agreement."

Board—The Board of Administration provided for in Article III hereof.

Collective Bargaining Agreement—The Collective Bargaining Agreement, dated November 25, 1958, entered into by and between the Company and the Union.

Credited Service—The aggregate number of years (and fractions thereof as herein specified) of Past Service Credits and Future Service Credits to which an "Employee" is entitled, determined in accordance with Article VI hereof, but in no event more than 30 years.

Deferred Early Retirement Benefit—An amount equal to the normal retirement benefit of a "Retired Employee," who, having been eligible for early retirement, has elected to receive such Deferred Early Retirement Benefit commencing at age sixty five (65).

Disability Retirement Benefit—An amount payable monthly to a Retired Emloyee eligible to receive a Disability Retirement Benefit hereunder equal to either (i) Eighty Dollars ($80.00) if such Retired Employee is not eligible for Disability Insurance Benefits under the Social Security Act; or (ii) one

Dollar and Sixty Cents ($1.60) multiplied by such Retired Employee's Credited Service at time of retirement for Permanent and Total Disability, but not to exceed Forty-eight Dollars ($48.00) if such Retired Employee is eligible for Disability Insurance Benefits under the Social Security Act, reduced in either case by Other Benefits, if any, of such Retired Employee.

Effective Date—The first day of the month in which the favorable determination or ruling letter of the Internal Revenue Service, referred to in Article I hereof, is received.

Employee—Any person employed by the Company who has "Seniority" status on or after the Effective Date, and is represented by the Union in the Bargaining Unit, provided that such term shall also include any former Retired Employee who has returned to active service with the Company and is represented by the Union in the Bargaining Unit.

Fund—The Trust Fund to be established by the Company as provided in Article IV, as it is originally constituted and as it may thereafter be constituted, pursuant to the provisions of the "Trust Agreement."

Immediate Early Retirement Benefit—An amount, payable monthly, equal to the Deferred Early Retirement Benefit of a Retired Employee, who having been eligible for early retirement, has elected to receive an Immediate Early Retirement Benefit, such amount to be reduced by 6/10 of one per cent for each complete calendar month included in the period from the date of early retirement to and including the date on which such Retired Employee would have reached age 65.

Normal Retirement Benefit—A monthly amount equal to One Dollar and Sixty Cents ($1.60) multiplied by a Retired Employee's Credited Service, but not to exceed a maximum of Forty Eight Dollars ($48.00).

Other Benefits—

(i) Any disability payments which a Retired Employee receives or would be entitled to receive under any present or future law of the United States (excluding "disability insurance benefit" under the Federal Social Security Act), or of any state, district, territory, or subdivision thereof, irrespective of any factor which may disqualify him for or diminish such benefits, such as, but not limited to, his engaging in employment for compensation or profit or failing to make a proper application, and which is paid from a source or fund to which the Company shall have contributed or would be required by law to contribute; and

(ii) Payments under any workmen's compensation or occupational disease law (except fixed statutory payments for the loss of any bodily member) and any disability damages recovered from the Company under common law. For the purposes hereof, lump sum payments under workmen's compensation or occupational disease laws shall be divided by the weekly payment on the basis of which such lump sum payment shall have been fixed, and the amount so determined shall be deemed to have been paid each week until exhausted, commencing with the date of receipt of such lump sum payment, and any such lump sum damages recovered from the Company shall be divided by 260 and the amount so determined shall be deemed to have been paid each week until exhausted commencing with the date of receipt of such damages.

Permanent and Total Disability—A physical or mental condition of a Retired Employee, determined by the Board on the basis of medical evidence in accordance with the provisions of Article VIII hereof, which will be reasonably certain to be permanent and continuous during lifetime, and which will prevent such person from engaging in any gainful occupation or employment (except such employment as is found to be for the purposes of rehabilitation), provided, however, such term

shall not include any condition (a) consisting of chronic alcoholism or addiction to narcotics, (b) contracted, suffered or incurred while engaging in a felonious criminal enterprise, (c) resulting from intentionally inflicted injury or self-induced sickness, or (d) resulting directly or indirectly from injury or disease while serving in the armed forces or merchant marine of any country.

Plan Year—The twelve-month period ending on the day in each calendar year which is the day before the anniversary of the Effective Date.

Retired Employee—A former Employee whose employment with the Company shall have terminated after the Effective Date under circumstances entitling him to a benefit hereunder commencing as provided in Article VIII, and who shall not have been re-employed by the Company; but such term shall not include a person with respect to whom a Disability Retirement Benefit shall have been terminated under circumstances not entitling such person to a Normal Retirement Benefit payable upon such termination.

Seniority—The number of years (and fractions thereof, as herein specified) included in the term "Seniority" as defined in Article XVIII of the Collective Bargaining Agreement.

Trust Agreement—The Agreement to be entered into between the Company and the "Trustee" as provided in Articles IV and V, as it originally exists and as it may be amended from time to time.

Trustee—The bank or trust company acting as trustee under the Trust Agreement.

Vested Deferred Retirement Benefit—A monthly amount equal to One Dollar and Sixty Cents ($1.60) multiplied by the Credited Service of a former Employee, but not to exceed a maximum of Forty Eight Dollars ($48.00), provided such former Employee having been eligible for a Vested Deferred Retirement Benefit has made application therefor at the time and in the manner in Article VIII provided.

ARTICLE III
ADMINISTRATION OF THE PLAN

1. This Plan shall be administered by a Board of Administration, three members of which shall be appointed by the Company, (hereinafter referred to as the "Company members"), and three members of which shall be appointed by the Union, (hereinafter referred to as the "Union members"). No monies shall be paid from the Fund for the compensation and expenses, if any, of the members of the Board. Compensation and expenses, if any, of the Company members shall be paid by the Company and compensation and expenses, if any, of the Union members shall be paid by the Union.

2. The Company at any time may remove a Company member and the Union at any time may remove a Union member. Any vacancy, caused by death, removal or inability to act, among Company members shall be filled by a new appointment made by the Company and any vacancy, for any such reason, among Union members shall be filled by a new appointment by the Union. Any such appointment or removal shall be effective only on the date specified therefor in a prior notice in writing, delivered by the appointing or removing party to the other party hereto, and which notice shall set forth the name or names of the member or members so appointed or removed.

3. The Board shall meet at such times as may be mutually agreed upon by its members for the expeditious transaction of necessary business. To constitute a quorum for the transaction of business, there shall be required to be present at any meeting of the Board at least two Union members and two Company members. At all meetings of the Board, the Company members shall have a total of three votes and the Union members shall have a total of three votes, the vote of any absent member being divided equally between the members present appointed by the same party. Decisions of the Board shall be by majority of the votes cast. In case any matter

arising in the course of the Board's administration of this Plan cannot be settled by a majority vote of the Board, the Board, by a majority vote, shall promptly appoint an Impartial Chairman, whose vote shall settle any such disputed matter, provided that such Impartial Chairman shall not vote at meetings of the Board under other circumstances. In the event of a deadlock in the selection of an Impartial Chairman by the Board (which shall continue for more than ten days in respect of any single matter in dispute), the Impartial Chairman shall be selected in the same manner as the arbitrator is selected under the Collective Bargaining Agreement, except that the Company members of the Board shall act in lieu of the Company representative and the Union members of the Board shall act in lieu of the Union representative. At any meeting of the Board at which an Impartial Chairman is acting, the Union and the Company shall have the right to submit to the Board, and the Board shall receive, such evidence as may be material to the matter in dispute. All fees and expenses of the Impartial Chairman shall be paid from the Fund.

4. The Board in its administration of this Plan shall have the following functions:

(a) It shall prescribe procedures to be followed by employees in filing applications for benefits and for the furnishing of evidence necessary to establish Employees' rights to such benefits;

(b) It shall make determinations of eligibility for benefits based upon the provisions of this Plan, and shall afford any individual dissatisfied with any such determination the right to a hearing thereon;

(c) It shall develop procedures for the establishment and verification of Credited Service of Employees, and after affording Employees an opportunity to make objection with respect thereto, it shall establish such facts conclusively in advance of retirement;

(d) It shall act promptly upon applications for benefits and shall notify the applicant and the Company in writing, whether or not, on the basis of the information submitted, the applicant is eligible under this Plan and, if so, the amount of his benefit;

(e) If an application for benefits is approved, it shall direct the Trustee, in writing, to make benefit payments to the applicant from the Fund, and it shall direct the Trustee to make payments from the Fund for the Trustee's fees and expenses, for the Actuary's fees and expenses, for the fees and expenses of examining physicians or clinics, and for other expenses necessary for the proper administration of the Plan, all such directions to the Trustee to be signed by at least two Union members and two Company members;

(f) It shall make the allocations set forth in Article X hereof, in the event of termination of this Plan;

(g) It shall designate the medical clinics and/or physicians to make the examinations provided for in Article VIII hereof;

(h) It shall furnish to the Company and to the Union, upon request, such reports with respect to its administration of the Plan as are reasonable and appropriate; and

(i) It shall notify each employee whose employment with the Company shall have terminated at a time when such employee shall have satisfied the eligibility requirements for a Vested Deferred Retirement Benefit, of the fact of such eligibility.

5. The Board shall have such powers as are necessary for the proper performance of the foregoing functions in administering the Plan, including the following:

(a) To prepare and distribute, in such manner as the Board determines to be appropriate, information explaining the Plan;

(b) To obtain from the Company, from the Union, and from the Employees such information as shall be necessary for proper administration of the Plan;

(c) To collect, evaluate, analyze and prepare statistical and other data with respect to its administration of the Plan;

(d) To obtain, for information purposes only, a copy of the actuarial reports prepared by the Actuary, which reports shall include a tabular summary of the employee data on which they are based, and a copy of the annual report of the Trustee;

(e) To prescribe rules and regulations for performance of its functions in administering the Plan; and

(f) To cause benefit payments to be made to another person for the benefit of any Retired Employee whom the Board shall find is unable to care for his affairs because of illness or accident, or is otherwise mentally or physically incompetent and unable to give a valid receipt (unless prior claim therefor shall have been made by duly qualified guardian or other legal representative), without responsibility on the part of the Board or the Trustee to follow the application of any such payment; and any such payment shall operate as a complete discharge of all liability therefor under this Plan and of the Fund.

6. The Board and any member thereof shall be entitled to rely upon the correctness of any information furnished by the Trustee, the Union, or the Company. Neither the Board nor any of its members, nor the Union, nor any officer or any other representative of the Union, nor the Company nor any officer or any other representative of the Company shall be liable because of any act or failure to act on the part of the Board, or any of its members, to any person whatsoever, except that nothing herein shall be deemed to relieve any such individual from liability for his own fraud or bad faith.

7. Neither the Board nor the Impartial Chairman shall have any power to add to or subtract from, or modify, any of the

terms of this Plan, or to change or add to any benefit provided by this Plan, or to waive or fail to apply any requirement of eligibility for a benefit under this Plan. Nothing contained herein shall be deemed to give the Board power to prescribe in any manner, internal procedures or operations of either the Union or the Company.

8. No ruling or decision of the Board in any one case shall create a basis for an adjustment in any other case, but, in making any ruling or decision, the Board shall act in such a way as not to discriminate in favor of or against any class or classes of Employees.

9. The Board shall decide all questions in accordance with the terms of the Plan and all decisions of the Board in accordance therewith shall be final and binding upon the Company, the Union, the employees and all claimants under the Plan.

ARTICLE IV
CONTRIBUTIONS

1. Promptly after the Company shall have received the favorable determination or ruling letter of the Internal Revenue Service referred to in Article I hereof, or at such earlier date as the Company may determine, the Company shall establish the Fund by executing and delivering the Trust Agreement, and by making an initial payment into the Fund of not less than One Thousand Dollars ($1,000.00). During the first Plan Year, the Company shall pay into the Fund such additional amounts as shall be necessary to pay the benefits, if any, to which Retired Employees are entitled hereunder during the first Plan Year.

2. The Company agrees to contribute to the Fund as its obligation hereunder for each Plan Year an amount as determined by the Actuary equal to the least of the following amounts:

(a) The sum of the following:

(1) The normal costs of providing the benefits under the Plan;

(2) The portion attributable to such Plan Year of the amount required to fund in full on a level basis over a 30-year period the accrued liability on the Effective Date; plus

(3) The estimated amount necessary to cover such administrative costs as are payable from the Fund for such Plan Year;

or

(b) The maximum amount that is deductible for Federal Income Tax purposes for the taxable year of the Company ending with or within such Plan Year.

3. Such contributions shall be paid to the Trustee, not later than sixty (60) days after the close of each Plan Year. The amount required to be contributed by the Company hereunder for the initial Plan Year under Section 2 of this Article shall be reduced by the amount contributed for such Year under Section 1 of this Article.

4. The Company may make, from time to time, such additional payments to the Fund as it, in its sole discretion, deems advisable. Such additional payments shall be credited against the contributions the Company is required to make in accordance with Section 2 of this Article.

5. Payments by the Company to the Trustee of the contributions determined under Sections 1 and 2 of this Article shall be in complete discharge of the Company's financial obligation under this Plan. The Company will cause the Board to be furnished with a certificate of the Actuary at least annually, as to compliance with the funding requirements contained herein.

6. No Employee shall make or be required to make any contributions to the Fund.

ARTICLE V
THE FUND AND THE TRUSTEE

1. The Company shall select a Trustee to hold and invest the Fund in accordance with the terms of the Trust Agreement, which shall be in such form and contain such provisions as the Company shall determine, subject as hereinafter provided. The Company may from time to time modify the terms and provisions of the Trust Agreement and may remove any Trustee and select a successor Trustee, provided that any such Trustee shall be a bank or trust company incorporated under the laws of the United States or of any state and qualified to conduct business as a trustee. The Trust Agreement shall provide that the Trustee shall have the sole discretion as to the investment and re-investment of the Fund. The Trustee may invest in any common trust fund or funds maintained by the Trustee.

2. The Fund may be combined, for investment purposes with other retirement funds maintained by the Company, and, in such event, the provisions of the Trust Agreement may be made applicable not only to the Fund but to such other funds as well, but, in the event of any such combination, separate accounting of the Fund shall be maintained to the end that such combination shall not result in the use of the Fund other than for the purposes set forth in this Plan.

3. The Fund shall be utilized for the payment of the benefits provided for herein and for payment of the Trustee's fees, expenses of administration, fees and expenses of the Actuary and fees and expenses of examining physicians or clinics to the extent not paid directly by the Company. Benefits provided for herein shall be only such benefits as can be provided by the assets of the fund. In the event of termination of this Plan, there shall be no liability or obligation on the part of the Company to make any further contributions to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid.

4. No part of the principal or income of the Fund shall in any event be used for or diverted to purposes other than those provided for in this Plan; provided that any balance remaining in the Fund, because of variations between actual and expected actuarial requirements, after the satisfaction of all direct and contingent liabilities for benefits and expenses herein set forth, shall be paid to the Company

ARTICLE VI
CREDITING SERVICE

1. An Employee who retires under the Plan after the Effective Date shall be entitled to Past Service Credits on the basis of total Seniority which he holds with the Company on the Effective Date, provided that no Past Service Credits shall be earned for any period after an employee's 68th birthday. Past Service Credits shall be computed to the nearest one-tenth year.

2. An Employee who retires under the Plan after the Effective Date shall be entitled to Future Service Credits for the service performed for the Company after the Effective Date on the following basis:

(a) An Employee shall be entitled to one (1) year of Future Service Credit for each Plan Year for which he has obtained 1,700 or more Creditable Hours (as hereinafter defined). An Employee having less than 1,700 Creditable Hours in any Plan Year shall be entitled to one-tenth of one (1) year of Future Service Credit for each 170 Creditable Hours, or major fraction thereof, he has obtained during such year.

(b) The following hours occurring prior to the attainment of age 68 by an Employee shall be creditable hours for purposes hereof;

(i) All hours for which an Employee receives pay from the Company, hours paid at premium rate being counted as straight-time hours;

(ii) All hours (not in excess of forty (40) hours per week) during any of the following periods of absence from work when an Employee normally would have been scheduled to work for the Company, but not including any period of time an Employee is entitled to receive benefits hereunder;

(a) Absence because of injury or disease sustained in the course of employment with the Company, and with respect to which Workmen's Compensation benefits are received by the Employee;

(b) Absence pursuant to leave of absence granted for personal illness or injury occurring during the period sickness or accident benefits are payable under the provisions of the group insurance plan of the Company as now in effect or as hereafter amended (or occurring during the period such benefits otherwise would have been payable if the Employee had not exhausted his benefit rights thereunder); in the event such leave of absence shall have been granted pursuant to the provisions of the Collective Bargaining Agreement;

(c) Absence pursuant to leave of absence granted for Local Union business, in the event such leave of absence shall have been granted pursuant to the provisions of the Collective Bargaining Agreement;

(d) Absence caused by reason of service in the Armed Forces of the United States in the event that the absent Employee had Seniority at the time of the commencement of such absence, retains re-employment rights with the Company under the provisions of law or the Collective Bargaining Agreement, and returns to work for the Company during the period he retains such re-employment rights (or reports to the Company, under such circumstances, and is given leave of absence or laid-off status), provided that no Creditable

Hours shall be earned except during the actual period of service in the Armed Forces.

3. An Employee shall lose his Credited Service in the event his employment and seniority with the Company are terminated in accordance with the provisions of the applicable Collective Bargaining Agreement; provided, however, that if such Employee is otherwise eligible for benefits under the Plan on the date of such termination, his Credited Service on such date shall be used in the determination of his benefit rights. If a Retired Employee is re-employed by the company, the Credited Service which he had at the time of previous retirement shall be reinstated for purposes of this Plan, provided that at such time of re-employment he is an "Employee." If an Employee who has accumulated Credited Service within the Bargaining Unit, and who has left the Bargaining Unit without leaving the employ of the Company, returns to the Bargaining Unit with reinstatement of seniority, the Credited Service which such Employee had at the time he left the Bargaining Unit shall be reinstated for the purposes of this Plan. If a Retired Employee who has been receiving Disability Retirement Benefits under the Plan recovers from his disability to such degree that he is no longer deemed permanently and totally disabled and he returns to work in the Bargaining Unit, the Credited Service which he had at time of previous disability retirement shall be reinstated for purposes of this Plan.

4. Any former Employee who loses his Credited Service under Section 3 above, and is later re-employed by the Company shall, upon making proper application, have such Credited Service reinstated provided such person is re-employed within thirty-six (36) consecutive months following the last day such person worked for the Company prior to the loss of Credited Service.

ARTICLE VII
ELIGIBILITY FOR BENEFITS

1. Only Employees whose employment with the Company shall have terminated after the Effective Date shall be eligible for benefits. The requirements for eligibility for benefits under this Plan are as follows:

(a) *For Normal Retirement Benefit*—An Employee with ten (10) years or more of Credited Service, whose employment with the Company shall have terminated on or after he attains the age of 65 years, shall be eligible for a Normal Retirement Benefit.

(b) *For Early Retirement Benefit*—An Employee with ten (10) years or more of Credited Service, whose employment with the Company shall have terminated on or after he attains the age of 60 years, but prior to attainment of age 65, shall be eligible, at his option, for either a Deferred Early Retirement Benefit or an Immediate Early Retirement Benefit.

(c) *For Disability Retirement Benefit*—An Employee with fifteen (15) years or more of Credited Service in respect of whom the Board shall have made a finding of Permanent and Total Disability, and whose active employment with the Company shall have ceased by reason of such disability prior to attainment of age 65, shall be eligible for Disability Retirement Benefit.

(d) *For Vested Deferred Retirement Benefit*—An Employee with fifteen (15) years or more of Credited Service, whose employment with the Company shall have terminated, on or after he attains the age of 45 years, but prior to the attainment of age 60, shall be eligible for a Vested Deferred Retirement Benefit.

2. Benefits shall become payable at the times and for the periods hereinafter set forth in Article VIII.

ARTICLE VIII
COMMENCEMENT AND DURATION OF BENEFITS

1. Normal Retirement Benefit, Immediate Early Retirement Benefit or Deferred Early Retirement shall become payable to a Retired Employee (if he shall then be living) on the first day of the first month after (a) his employment with the Company shall have terminated, (b) he shall have filed an application for such benefit with the Board, and (c) (in case of a Retired Employee eligible to receive a Deferred Early Retirement Benefit) he shall have attained the age of 65 years; and shall be payable on the first day of each month thereafter during his lifetime so long as he remains a Retired Employee.

2. Vested Deferred Retirement Benefit shall become payable to a Retired Employee (if he shall then be living) on the first day of the first month after (a) he has attained the age of 65 years, and (b) he shall have filed an application for such benefit with the Board, which application shall have been filed not earlier than 60 days prior to his 65th birthday and not later than his 70th birthday, and shall be payble on the first day of each month thereafter so long as he remains a Retired Employee.

3. Disability Retirement Benefit shall become payable and shall continue to be payable under the following circumstances:

(a) Disability Retirement Benefit shall become payable to a Retired Employee (if he shall then be living) on the first day of the first month after (i) his active employment with the Company shall have ceased because of Permanent and Total Disability, (ii) he shall have filed application for such benefit with the Board, (iii) he shall have ceased to be eligible to receive weekly sickness or accident benefits under the Company's Group Insurance Plan, and (iv) the Board shall have made a finding with respect to such person of Permanent and Total Disability based upon medical evidence resulting from an examination made by a diagnostic

medical clinic or one or more physicians (either being qualified in the field of psychiatric diagnosis, in the event a mental condition is made the basis of a claim for Disability Retirement Benefit). Such benefit shall continue to be payable to such Retired Employee until terminated as hereinafter provided.

(b) A Disability Retirement Benefit shall be terminated on the first to occur of the following events:

(i) the Retired Employee shall have engaged in any gainful occupation or employment, except for purposes of rehabilitation approved by the Board;

(ii) the Board shall have determined, on the basis of a medical examination, that the Retired Employee no longer has a Permanent and Total Disability;

(iii) the Retired Employee shall have refused to submit to a medical examination ordered by the Board, provided that he shall not be required to submit to a medical examination more often than twice in any 12-month period;

(iv) The Retired Employee shall become eligible for an "Old Age Insurance Benefit" under the Federal Social Security Act as in effect on the date hereof or as hereafter amended.

(c) In the event that Disability Retirement Benefit is terminated for the reason set forth in sub-paragraph (b) (iv) of this Section 3, a Normal Retirement Benefit based on the Retired Employee's Credited Service to the date of his disability retirement shall become payable to him commencing on the first day of the first month after such termination (if he shall then be living), and shall be payable on the first day of each month thereafter during his lifetime, so long as he remains a Retired Employee.

(d) In the event that a Disability Retirement Benefit is terminated for reasons set forth in sub-paragraph (b) (i), (ii),

or (iii) of this Section 3, a Vested Deferred Retirement Benefit shall become payable under the conditions set forth in Section 2 of this Article VIII, provided that the Retired Employee shall have otherwise been eligible for such Vested Deferred Retirement Benefit at the time of the commencement of his Permanent and Total Disability.

ARTICLE IX
AMENDMENT OF THE PLAN

1. The Company and the Union agree to make such modifications, alterations, or amendments to this Agreement and Plan, and the Company agrees to make such amendments to the Trust Agreement as may be necessary—

(a) to establish and maintain the status of the trust created under the Trust Agreement as a qualified pension trust and the deductibility for income tax purposes of Company contributions thereto under the provisions of Sections 501, 401 and 404 or other applicable provisions of the Internal Revenue Code of 1954 or other Federal tax legislation, as now in effect or hereafter enacted, and the Regulations issued thereunder, all as evidenced by a favorable ruling or determination letter or letters of the Internal Revenue Service, and

(b) to comply with any Federal or State laws or regulations promulgated thereunder;

provided no such modification, alteration or amendment shall be required that would, in any manner, change the amount of the contributions to be made hereunder by the Company. This Agreement and Plan otherwise may be amended at any time and from time to time by mutual agreement of the Company and the Union. Any modification, alteration or amendment of the Plan or the Trust Agreement made in accordance with this Section 1, may be made retroactively, if necessary or appropriate.

2. Except as provided in Section 1 of this Article, neither the Company nor the Union shall demand any change in this

Agreement and Plan to be effective before October 31, 1961, nor, prior to August 31, 1961, shall either party be required to bargain or negotiate with respect to pensions, retirement benefits or disability benefits, or with respect to any amendment to this Agreement and Plan. No demand or request for any change or amendment in this Agreement and Plan shall be an objective of, or be stated as reasons for, any strike or lockout or other exercise of economic force or threat either by the Union or by the Company prior to the end of the term of the Collective Bargaining Agreement.

3. In the event that either the Company or the Union desires to negotiate with respect to a modification of this Agreement and Plan, to be effective not earlier than October 31, 1961, it shall give the other party at least 60 days prior written notice thereof. Negotiations shall commence on the 60th day after the serving of such notice or on August 31, 1961, whichever date is later, provided that negotiations may commence earlier by mutual agreement of the parties. During the period of any such negotiations, this Agreement and Plan shall remain in effect.

ARTICLE X
TERMINATION OF THE PLAN

1. This Plan is intended to be a permanent plan, provided that either party reserves the right to terminate this Agreement and Plan as hereinafter provided.

2. In the event that either party desires to terminate this Agreement and Plan, it shall give the other party 90 days prior written notice thereof, which notice may be served at any time during the negotiations referred to in Section 3, of Article IX, or at any time after August 31, 1961, whichever time is earlier. On the 90th day after the serving of the notice specified in this Section, this Plan and Agreement shall terminate.

3. In the event of termination of the Plan, the assets then remaining in the Fund, after providing the accrued and anticipated expenses of the Plan and Fund, (including without limitation, expenses of terminating the Plan), shall be allocated by the Board on the basis of present actuarial values to the extent that they shall be sufficient, for the purposes of paying retirement benefits (the amount of which shall be computed on the basis of Credited Service to the date of termination of the Plan) in the following order or precedence:

(a) To provide their retirement benefits to persons who shall have been Retired Employees and entitled to current benefits under the Plan prior to its termination, without reference to the order of retirement;

(b) To provide Normal Retirement Benefits to Employees aged 65 or over on the date of termination of the Plan, without reference to the order in which they shall have reached age 65;

(c) To provide Disability Retirement Benefits to Employees who shall have applied for such benefits prior to the date of termination of the Plan and who are determined to have been eligible for such benefits under provisions of the Plan prior to such date of termination, without reference to the order in which they filed application or met eligibility requirements;

(d) To provide Normal Retirement Benefits at age 65 to Employees aged 60 or over but less than 65 on the date of termination of the Plan, without reference to the order in which they shall reach age 65;

(e) To provide Normal Retirement Benefits at age 65 to Employees aged 50 or over but less than 60 on the date of termination of the Plan, without reference to the order in which they shall reach age 65;

(f) To provide Normal Retirement Benefits at age 65 to Employees below the age of 50 on the date of termination of the Plan, without reference to the order in which they shall reach age 65.

If, after having made provision in the above order of precedence for some but not all of the above categories, the assets then remaining in the Fund are not sufficient to provide completely for the benefits for Employees in the next category, such benefits shall be provided for each such Employee on a pro-rata basis.

4. In making the allocations under Section 3, (b) (d) (e) and (f) of this Article, only actual Credited Service shall be used in determining amounts of benefits, but there shall be no minimum Credited Service requirement of Employees for eligibility for Normal Retirement Benefit.

5. Former Employees who, on termination of employment, were entitled to a Vested Deferred Retirement Benefit hereunder and who, on the date of termination of the Plan, had not yet commenced to receive such Benefit, shall be included within the respective age categories set forth in sub-sections (b), (d), (e) and (f) of Section 3 of this Article for the purposes of the allocation provided for herein; provided, however, that in each category Employees shall be given precedence over such former Employees.

6. Such allocation shall be accomplished through either (i) continuance of the Fund, (ii) creation of a new fund or a pooled fund, or (iii) purchase of annuity contracts. However, the Board upon finding that it is not practicable or desirable under the circumstances to do any of the foregoing with respect to the lowest priority group that has assets allocated to it, (and then only when such assets are insufficient to meet fifty per cent of the liabilities of such priority group), may, with the unanimous consent of all its members, provide for allocation of all of the assets allocated to such priority group as lump sum cash payments in proportion to years of Credited Service to the date of termination of the Plan.

7. Notwithstanding any other provisions of the Plan, for the purposes of this Article, no employee shall cease to be an

employee merely as a direct result of circumstances leading up to the termination of the Plan.

ARTICLE XI
MISCELLANEOUS

1. No benefit payable at any time under this Plan shall be subject in any manner to alienation, sale, transfer, assignment, pledge, attachment, garnishment, or encumbrance of any kind. Any attempt to alienate, sell, transfer, assign, pledge or otherwise encumber any such benefit, whether presently or thereafter payable, shall be void. Neither the Fund nor any such benefit shall in any manner be liable for or subject to the debts or liability of any Employee, Retired Employee or former Employee entitled to or receiving any benefit hereunder. If a Retired Employee shall attempt to, or shall, alienate, sell, transfer, assign, pledge, or otherwise encumber his benefit under this Plan or any part thereof, or, if by reason of his bankruptcy, or any other event such benefit would devolve upon anyone else or would not be enjoyed by him, then the Board, in its discretion, may terminate the Retired Employee's interest in any such benefit and hold or apply it to, or for the benefit of, his spouse, children, or other dependents, or any of them, in such manner as the Board may deem proper; and any such payment shall be a complete discharge protanto of all liability of the Board and the Fund to such Retired Employee under this Plan.

2. Each Retired Employee shall be responsible for furnishing the Board with the address to which he wishes his benefit checks mailed. If, after the commencement of the payments of benefits hereunder to any Retired Employee, or after termination of the Plan, the Board is unable after reasonable search to locate any such Retired Employee or is unable to locate a former Employee entitled to benefits hereunder, it shall mail by registered or certified mail, postage prepaid, to the last known address of such person, a notice to the effect that such person is entitled to receive benefits hereunder, and (a) if such

notice is returned by the Post Office as being undeliverable because the addressee cannot be located at the address indicated, and if neither the Company, the Trustee nor the Board shall obtain any knowledge of such person's whereabouts within the two years from the date such notice is mailed (one (1) year, in the event such notice is mailed after termination of the Plan), or (b) if within such two (2), or one (1) year period, as the case may be, there is no response to such notice, informing the Board of such person's whereabouts, then, in either of such events, at the end of the applicable two (2), or one (1) year period, the rights of any such person to benefits hereunder shall be forfeited. In the event any such forfeiture occurs after the termination of the Plan with respect to a person in a category for which there were insufficient assets of the Fund to make full allocation as provided in Article X, then the amounts so forfeited shall be reallocated pro rata to the other persons in such category, to the extent available to make allocations up to the full amounts of the allocations to such persons as provided in Article X.

3. The Company's right to discipline or to discharge Employees shall not be affected by reason of any of the provisions of this Plan. Nothing in this Plan shall be construed as giving any Employee any right to be retained at work or in the employ of the Company.

4. No Employee shall have any vested right under this Plan except to the extent that he may be entitled (a) to Vested Deferred Retirement Benefit, or (b) benefits payable upon retirement, all as herein provided.

5. In determining whether a Retired Employee shall have become eligible for "Old Age Insurance Benefit" or "Disability Insurance Benefit" under the Social Security Act, or corresponding benefit for any purpose hereof, such Retired Employee shall be considered as being eligible for such benefit regardless of the fact that he does not actually receive such benefit, or once having received such benefit subse-

quently becomes disqualified therefor, in either event, by failure to make proper application therefor, entering into covered employment, or any other act or failure to act on his part.

6. Notwithstanding anything herein contained to the contrary, in the event monthly benefits payable hereunder to any Retired Employee shall be an amount less than Ten Dollars ($10.00), the Board may authorize payments to be made quarterly in lieu of monthly, and in the event such quarterly payments would be in an amount less than Ten Dollars ($10.00), the Board may authorize payments to be made annually.

7. The use of gender references herein is merely for convenience and shall have no legal effect.

8. Any notice or other thing required or desired to be served, made or delivered hereunder shall be in writing and shall be deemed validly served, made or delivered upon the deposit thereof in the United States registered or certified mail, postage prepaid, and addressed to the party to be notified as follows:

The Company:	Fred A. Naçhman, Jr. 4560 West Armitage Avenue Chicago, Illinois.
The Union:	Robert Johnston 54 West Randolph Street Chicago, Illinois.

IN WITNESS WHEREOF the parties have caused this Agreement and Plan to be executed the day and year first above written.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AFFILIATED WITH AFL-CIO AND ITS LOCAL 1003	NACHMAN CORPORATION

NACHMAN CORPORATION (CHICAGO PLANT)

AMENDMENT NO. 1

TO

AGREEMENT AND PENSION PLAN (UAW)

Dated February 29, 1960

By instrument, dated February 29, 1960, entered into by and between NACHMAN CORPORATION, an Illinois corporation (therein and hereinafter called the "Company"), and the INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) affiliated with AFL-CIO, and its Local 1003 (therein and hereinafter called the "Union"), the Nachman Corporation (Chicago Plant)—UAW Pension Plan (herein called the "Plan") was established. The Plan provides in Article IX thereof that it may be amended at any time and from time to time by mutual agreement of the Company and the Union. The Company and the Union have mutually agreed to amend the Plan in the respects hereinafter stated.

Accordingly, the Plan is hereby amended in the following respects:

FIRST

Article II of the Plan is hereby amended by—

(a) Deleting the definition of "Collective Bargaining Agreement" contained therein and inserting in lieu thereof the following:

> "*Collective Bargaining Agreement*—The Collective Bargaining Agreement, dated November 1, 1963, entered into by and between the Company and the Union.";

(b) Adding the following sentence to the definition of "Disability Retirement Benefit":

> "Notwithstanding the foregoing, the words and figures 'One Dollar and Eight-nine Cents ($1.89)' and 'Fifty-six Dollars and Seventy Cents ($56.70)' shall be substituted for the words and figures 'One Dollar and Sixty Cents ($1.60)' and 'Forty-eight Dollars ($48.00)', respectively, in the next preceding sentence, with respect to a Retired Employee eligible to receive a Disability Retirement Benefit, whose retirement for Permanent and Total Disability shall have occurred after November 1, 1964 and before November 2, 1965, and the words and figures 'Two Dollars and Seventeen Cents ($2.17)' and 'Sixty-Five Dollars and Ten Cents ($65.10)' shall be substituted for the words and figures 'One Dollar and Sixty Cents ($1.60)' and 'Forty-eight Dollars ($48.00)', respectively, in the next preceding sentence, with respect to a Retired Employee eligible to receive a Disability Retirement Benefit, whose retirement for Permanent and Total Disability shall have occurred after November 1, 1965.";

(c) Adding the following sentence to the definition of "Normal Retirement Benefit":

> "Notwithstanding the foregoing, the words and figures 'One Dollar and Eighty-nine Cents ($1.89)' and 'Fifty-six Dollars and Seventy Cents ($56.70)' shall be substituted for the words and figures 'One Dollar and Sixty Cents ($1.60)' and 'Forty-eight Dollars ($48.00)', respectively, in the next preceding sentence, with respect to a person who shall have become a Retired Employee after November 1, 1964 and before November 2, 1965, and the words and figures 'Two Dollars and Seventeen Cents ($2.17)' and 'Sixty-five Dollars and Ten Cents ($65.10)' shall be substituted for the words and figures 'One Dollar and Sixty Cents ($1.60)' and 'Forty-eight Dollars ($48.00)', respectively, in the next preceding sentence, with respect to a person who shall have become a Retired Employee after November 1, 1965.";

and

(d) Adding the following sentence to the definition of "Vested Deferred Retirement Benefit":

> "Notwithstanding the foregoing, the words and figures 'One Dollar and Eighty-nine Cents ($1.89)', and 'Fifty-six

Dollars and Seventy Cents ($56.70)' shall be substituted for the words and figures 'One Dollar and Sixty Cents ($1.60)' and 'Forty-eight Dollars ($48.00)', respectively, in the next preceding sentence with respect to any such former Employee whose employment with the Company shall have been terminated after November 1, 1964 and before November 2, 1965, and the words and figures 'Two Dollars and Seventeen Cents ($2.17)' and 'Sixty-five Dollars and Ten Cents ($65.10)' shall be substituted for the words and figures 'One Dollar and Sixty Cents ($1.60)' and 'Forty-eight Dollars ($48.00)', respectively, in the next preceding sentence, with respect to any such former Employee whose employment with the Company shall have been terminated after November 1, 1965."

SECOND

Article IV of the Plan is hereby amended by deleting Paragraph 2(a)(2) thereof and inserting in lieu thereof the following:

"(2) The portion attributable to such Plan Year of the amount required to fund in full on a level basis over a 30-year period commencing on the Effective Date the initial unfunded accrued liability, plus the portion attributable to such Plan Year of the amount required to fund in full on a level basis over a 30-year period commencing on the effective date of any amendment to the Plan any additional unfunded accrued liability arising from increased benefits pursuant to such amendment; plus".

THIRD

Article IX of the Plan is hereby amended by—

(a) Changing the words and figures "October 31, 1961" wherever they appear in Paragraphs 2 and 3 thereof to the words and figures "October 31, 1966";

and

(b) Changing the words and figures "August 31, 1961" wherever they appear in Paragraphs 2 and 3 thereof to the words and figures "August 31, 1966".

FOURTH

Article X of the Plan is hereby amended by changing the words and figures "August 31, 1961" where they appear in Paragraph 2 thereof to the words and figures "August 31, 1966".

Except as changed, modified and amended hereby, all of the terms and provisions of the Plan shall be and remain in full force and effect.

IN WITNESS WHEREOF, the parties have caused this instrument to be executed, this ____ day of ____________, 1965, as of November 1, 1964.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AFFILIATED WITH AFL-CIO AND ITS LOCAL 1003	NACHMAN CORPORATION

NACHMAN CORPORATION (CHICAGO PLANT)

AMENDMENT NO. 2

TO

AGREEMENT AND PENSION PLAN (UAW)

Dated February 29, 1960

By instrument, dated February 29, 1960, entered into by and between NACHMAN CORPORATION, an Illinois corporation (therein and hereinafter called the "Company"), and the INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT

BILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) affiliated with AFL-CIO, and its Local 1003 (therein and hereinafter called the "Union"), the Nachman Corporation (Chicago Plant)—UAW Pension Plan (herein called the "Plan") was established. The Plan provides in Article IX thereof that it may be amended at any time and from time to time by mutual agreement of the Company and the Union. The Plan was previously amended by agreement dated August 16, 1965 as of November 1, 1964 and entitled "Amendment No. 1 To Agreement and Pension Plan (UAW) Dated February 29, 1960" (herein called "Amendment No. 1"). The Company and the Union have mutually agreed to further amend the Plan in the respects hereinafter stated.

Accordingly, the Plan is hereby amended in the following respects:

FIRST

Article II of the Plan is hereby amended by—

(a) Deleting the definition of "Collective Bargaining Agreement" contained therein as amended by Amendment No. 1 and inserting in lieu thereof the following:

"*Collective Bargaining Agreement*—The Collective Bargaining Agreement, dated November 1, 1970, entered into by and between the Company and the Union.";

(b) Deleting the last sentence of the definition of "Disability Retirement Benefit" contained therein (as added by Amendment No. 1) and inserting in lieu thereof the following:

"Notwithstanding the foregoing, the words and figures 'One Dollar and Eighty-nine Cents ($1.89)' and 'Fifty-six Dollars and Seventy Cents ($56.70)' shall be substituted for the words and figures 'One Dollar and Sixty Cents ($1.60)' and Forty-eight Dollars ($48.00)', respectively, in the next preceding sentence, with respect to a Retired Employee eligible to receive a Disability Retirement Benefit, whose retirement for Permanent and Total Disability shall have occurred after November 1, 1964 and before November 2, 1965, and the words and figures 'Two Dollars and Seventeen Cents ($2.17)' and 'Sixty-five Dollars and Ten Cents ($65.10)' shall be substituted for the words and figures 'One Dollar and Sixty Cents ($1.60)' and 'Forty-eight Dollars ($48.00)', respectively, in the next preceding sentence, with respect to a Retired Employee eligible to receive a Disability Retirement Benefit, whose retirement for Permanent and Total Disability shall have occurred after November 1, 1965 and before November 2, 1970, and the words and figures 'Two Dollars and Forty-five Cents ($2.45)' and 'Seventy-three Dollars and Fifty Cents ($73.50)' shall be substituted for the words and figures 'One Dollar and Sixty Cents ($1.60)' and 'Forty-eight Dollars ($48.00)', respectively, in the next preceding sentence, with respect to a Retired Employee eligible to receive a Disability Retirement Benefit whose retirement for Permanent and Total Disability shall have occurred after November 1, 1970 and before November 2, 1971, and the words and figures 'Two Dollars and Eighty-seven Cents ($2.87)' and 'Eighty-six Dollars and Ten Cents ($86.10)' shall be substituted for the words and figures 'One Dollar and Sixty Cents ($1.60)' and 'Forty-eight Dollars ($48.00)', respectively, in the next preceding sentence with respect to a Retired Employee eligible to receive a Disability Retirement Benefit, whose retirement for Permanent and Total Disability shall have occurred after November 1, 1971.";

(c) Deleting the last sentence of the definition of "Normal Retirement Benefit" contained therein (as added by Amendment No. 1) and inserting in lieu thereof the following:

"Notwithstanding the foregoing, the words and figures 'One Dollar and Eighty-nine Cents ($1.89)' and 'Fifty-six Dollars and Seventy Cents ($56.70)' shall be substituted for the words and figures 'One Dollar and Sixty Cents ($1.60)' and Forty-eight Dollars ($48.00)', respectively, in the next preceding sentence, with respect to a person who shall have become a Retired Employee after November 1, 1964 and before November 2, 1965, and the words and figures 'Two Dollars and Seventeen Cents ($2.17)'

and 'Sixty-five Dollars and Ten Cents ($65.10)' shall be substituted for the words and figures 'One Dollar and Sixty Cents ($1.60)' and 'Forty-eight Dollars ($48.00)', respectively, in the next preceding sentence, with respect to a person who shall have become a Retired Employee after November 1, 1965 and before November 2, 1970, and the words and figures 'Two Dollars and Forty-five Cents ($2.45)' and 'Seventy-three Dollars and Fifty Cents ($73.50)' shall be substituted for the words and figures 'One Dollar and Sixty Cents ($1.60)' and 'Forty-eight Dollars ($48.00)', respectively, in the next preceding sentence, with respect to a person who shall have become a Retired Employee after November 1, 1970 and before November 2, 1971, and the words and figures 'Two Dollars and Eighty-seven Cents ($2.87)' and 'Eighty-six Dollars and Ten Cents ($86.10)' shall be substituted for the words and figures 'One Dollar and Sixty Cents ($1.60)' and 'Forty-eight Dollars ($48.00)', respectively, in the next preceding sentence with respect to a person who shall have become a Retired Employee after November 1, 1971.";

and

(d) Deleting the last sentence of the definition of "Vested Deferred Retirement Benefit" contained therein (as added by Amendment No. 1) and inserting in lieu thereof the following:

"Notwithstanding the foregoing, the words and figures 'One Dollar and Eighty-nine Cents ($1.89)' and 'Fifty-six Dollars and Seventy Cents ($56.70)' shall be substituted for the words and figures 'One Dollar and Sixty Cents ($1.60)' and Forty-eight Dollars ($48.00)', respectively, in the next preceding sentence, with respect to any such former Employee whose employment with the Company shall have been terminated after November 1, 1964 and before November 2, 1965, and the words and figures 'Two Dollars and Seventeen Cents ($2.17)' and 'Sixty-five Dollars and Ten Cents ($65.10)' shall be substituted for the words and figures 'One Dollar and Sixty Cents ($1.60)' and 'Forty-eight Dollars ($48.00)', respectively, in the next preceding sentence, with respect to any such former Employee whose employment with the Company shall have been terminated after November 1, 1965 and before November 2, 1970, and the words and figures 'Two Dollars and Forty-five Cents ($2.45)' and 'Seventy-three Dollars and Fifty Cents ($73.50)' shall be substituted for the words and figures 'One Dollar and Sixty Cents ($1.60)' and 'Forty-eight Dollars ($48.00)', respectively, in the next preceding sentence, with respect to any such former Employee whose employment with the Company shall have been terminated after November 1, 1970 and before November 2, 1971, and the words and figures 'Two Dollars and Eighty-seven Cents ($2.87)' and 'Eighty-six Dollars and Ten Cents ($86.10)' shall be substituted for the words and figures 'One Dollar and Sixty Cents ($1.60)' and 'Forty-eight Dollars ($48.00)', respectively, in the next preceding sentence with respect to any such former Employee whose employment with the Company shall have been terminated after November 1, 1971."

SECOND

Article IX of the Plan as amended by Amendment No. 1 is hereby further amended by—

(a) Changing the words and figures "October 31, 1966" wherever they appear in Paragraphs 2 and 3 thereof to the words and figures "October 31, 1972";

and

(b) Changing the words and figures "August 31, 1966" wherever they appear in Paragraphs 2 and 3 thereof to the words and figures "August 31, 1972."

THIRD

Article X of the Plan as amended by Amendment No. 1 is hereby further amended by changing the words and figures "August 31, 1966" where they appear in Paragraph 2 thereof to the words and figures "August 31, 1972."

Except as changed, modified and amended hereby, all of the terms and provisions of the Plan shall be and remain in full force and effect.

IN WITNESS WHEREOF, the parties have caused this instrument to be executed this 14th day of June, 1971, as of November 1, 1970.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AFFILIATED WITH AFL-CIO AND ITS LOCAL 1003	NACHMAN CORPORATION

NACHMAN CORPORATION (CHICAGO PLANT)

AMENDMENT NO. 3

TO

AGREEMENT AND PENSION PLAN (UAW)
Dated February 29, 1960

By instrument, dated February 29, 1960, entered into by and between NACHMAN CORPORATION, an Illinois corporation (therein and hereinafter called the "Company"), and the INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) affiliated with AFL-CIO, and its Local 1003 (therein and hereinafter called the "Union"), the Nachman Corporation (Chicago Plant)—UAW Pension Plan (herein called the "Plan") was established. The Plan provides in Article IX thereof that it may be amended at any time and from time to time by mutual agreement of the Company and the Union. The Plan was previously amended by agreement dated August 16, 1965 as of November 1, 1964 and entitled "Amendment No. 1 to Agreement and Pension Plan (UAW) Dated February 29, 1960" (herein called "Amendment No. 1"), and June 14, 1971 as of November 1, 1970 and entitled "Amendment No. 2 To Agreement and

1970 and entitled "Amendment No. 2 To Agreement and Pension Plan (UAW) Dated February 29, 1960" (herein called Amendment No. 2"). The Company and the Union have mutually agreed to further amend the Plan in the respects hereinafter stated.

Accordingly, the Plan is hereby amended in the following respects:

FIRST

Article II of the Plan is hereby amended by—

(a) Deleting the definition of "Collective Bargaining Agreement" contained therein as amended by Amendment No. 2 and inserting in lieu thereof the following:

"*Collective Bargaining Agreement*—

The Collective Bargaining Agreement, dated February 12, 1973 (effective November 1, 1972) entered into by and between the Company and the Union.";

(b) Deleting the definition of "Disability Retirement Benefit" contained therein as amended by Amendment No. 2 and inserting in lieu thereof the following:

"An amount payable monthly to a Retired Employee eligible to receive a Disability Retirement Benefit hereunder equal to:

(i) if such Retired Employee is not eligible for Disability Insurance Benefits under the Social Security Act, Eighty Dollars ($80.00); or

(ii) if such Retired Employee is eligible for Disability Benefits under the Social Security Act:

(A) and such Retired Employee's retirement for Permanent and Total Disability shall have occurred before November 2, 1964, One Dollar and Sixty Cents ($1.60) multiplied by such Retired Employee's Credited Service at the time of such retirement, but not to exceed Forty-eight Dollars ($48.00);

(B) and such Retired Employee's retirement for Permanent and Total Disability shall have occurred after November 1, 1964, and before November 2, 1965, One Dollar and Eighty-Nine Cents ($1.89) multiplied by such Retired Employee's Credited Service at the time of such retirement, but not to exceed Fifty-Six Dollars and Seventy Cents ($56.70);

(C) and such Retired Employee's retirement for Permanent and Total Disability shall have occurred after November 1, 1965 and before November 2, 1970, Two Dollars and Seventeen Cents ($2.17) multiplied by such Retired Employee's Credited Service at the time of such retirement, but not to exceed Sixty-five Dollars and Ten Cents ($65.10);

(D) and such Retired Employee's retirement for Permanent and Total Disability shall have occurred after November 1, 1970 and before November 2, 1971, Two Dollars and Forty-five Cents ($2.45) multiplied by such Retired Employee's Credited Service at the time of such retirement, but not to exceed Seventy-three Dollars and Fifty Cents ($73.50);

(E) and such Retired Employee's retirement for Permanent and Total Disability shall have occurred after November 1, 1971 and before November 2, 1972, Two Dollars and Eighty-seven Cents ($2.87) multiplied by such Retired Employee's Credited Service at the time of such retirement, but not to exceed Eighty-six Dollars and Ten Cents ($86.10);

(F) and such Retired Employee's retirement for Permanent and Total Disability shall have

occurred after November 1, 1972 and before November 2, 1973, Three Dollars and Twenty-five Cents ($3.25) multiplied by such Retired Employee's Credited Service at the time of such retirement, but not to exceed Ninety-seven Dollars and Fifty Cents ($97.50);

(G) and such Retired Employee's retirement for Permanent and Total Disability shall have occurred after November 1, 1973, Three Dollars and Fity Cents ($3.50) multiplied by such Retired Employee's Credited Service at the time of such retirement, but not to exceed One Hundred and Five Dollars ($105.00);

reduced in every case by Other Benefits, if any, of such Retired Employee."

(c) Deleting the definition of "Normal Retirement Benefit" contained therein as amended by Amendment No. 2 and inserting in lieu thereof the following:

"An amount payable monthly equal to:

(i) with respect to a person who shall have become a Retired Employee before November 2, 1964, One Dollar and Sixty-Cents ($1.60) multiplied by such Retired Employee's Credited Service, but not to exceed Forty-eight Dollars ($48.00);

(ii) with respect to a person who shall have become a Retired Employee after November 1, 1964 and before November 2, 1965, One Dollar and Eighty-nine Cents ($1.89) multiplied by such Retired Employee's Credited Service, but not to exceed Fifty-Six Dollars and Seventy Cents ($56.70);

(iii) with respect to a person who shall have become a Retired Employee after November 1, 1965 and before November 2, 1970, Two Dollars and Seventeen Cents ($2.17) multiplied by such Retired

Employee's Credited Service, but not to exceed Sixty-five Dollars and Ten Cents ($65.10);

(iv) with respect to a person who shall have become a Retired Employee after November 1, 1970 and before November 2, 1971, Two Dollars and Forty-five Cents ($2.45) multiplied by such Retired Employee's Credited Service, but not to exceed Seventy-three Dollars and Fifty Cents ($73.50);

(v) with respect to a person who shall have become a Retired Employee after November 1, 1971 and before November 2, 1972, Two Dollars and Eighty-seven Cents ($2.87) multiplied by such Retired Employee's Credited Service, but not to exceed Eighty-six Dollars and Ten Cents ($86.10);

(vi) with respect to a person who shall have become a Retired Employee after November 1, 1972 and before November 2, 1973, Three Dollars and Twenty-five Cents ($3.25) multiplied by such Retired Employee's Credited Service, but not to exceed Ninety-seven Dollars and Fifty Cents ($97.50);

(vii) with respect to a person who shall have become a Retired Employee after November 1, 1973, Three Dollars and Fifty Cents ($3.50) multiplied by such Retired Employee's Credited Service, but not to exceed One Hundred and Five Dollars ($105.00); and

(d) Deleting the definition of "Vested Deferred Retirement Benefit" contained therein as amended by Amendment No. 2 and inserting in lieu thereof the following:

"An amount payable monthly equal to:

(i) with respect to a former Employee whose employment with the Company shall have been terminated before November 2, 1964, One Dollar and Sixty Cents ($1.60) multiplied by such Retired Employee's Credited Service, but not to exceed Forty-eight Dollars ($48.00);

(ii) with respect to a former Employee whose employment with the Company shall have been terminated after November 1, 1964 and before November 2, 1965, One Dollar and Eighty-nine Cents ($1.89) multiplied by such Retired Employee's Credited Service, but not to exceed Fifty-Six Dollars and Seventy Cents ($56.70);

(iii) with respect to a former employee whose employment with the Company shall have been terminated after November 1, 1965 and before November 2, 1970, Two Dollars and Seventeen Cents ($2.17) multiplied by such Retired Employee's Credited Service, but not to exceed Sixty-five Dollars and Ten Cents ($65.10);

(iv) with respect to a former Employee whose employment with the Company shall have been terminated after November 1, 1970 and before November 2, 1971, Two Dollars and Forty-five Cents ($2.45) multiplied by such Retired Employee's Credited Service, but not to exceed Seventy-three Dollars and Fifty Cents ($73.50);

(v) with respect to a Former Employee whose employment with the Company shall have beem terminated after November 1, 1971 and before November 2, 1972, Two Dollars and Eighty-seven Cents ($2.87) multiplied by such Retired Employee's Credited Service, but not to exceed Eighty-six Dollars and Ten Cents ($86.10);

(v) with respect to a former Employee whose employment with the Company shall have been terminated after November 1, 1972 and before November 2, 1973, Three Dollars and Twenty-five Cents ($3.25) multiplied by such Retired Employee's Credited Service, but not to exceed Ninety-seven Dollars and Fifty Cents ($97.50);

(vii) with respect to a former Employee whose employment with the Company shall have been terminated after November 1, 1973, Three Dollars and Fifty Cents ($3.50) multiplied by such Retired

Employee's Credited Service, but not to exceed One Hundred and Five Dollars ($105.00);

provided such former Employee having been eligible for a Vested Deferred Retirement Benefit has made application therefor at the time and in the manner in Article VIII provided."

SECOND

Article IX of the Plan as amended by Amendment No. 2 is hereby further amended by—

(a) Changing the words and figures "October 31, 1972" wherever they appear in Paragraphs 2 and 3 thereof to the words and figures "October 31, 1975." and

(b) Changing the words and figures "August 31, 1972" wherever they appear in Paragraphs 2 and 3 thereof to the words and figures "August 31, 1975."

THIRD

Article X of the Plan as amended by Amendment No. 2 is hereby further amended by changing the words and figures "August 31, 1972" where they appear in Paragraph 2 thereof to the words and figures "August 31, 1975."

Except as changed, modified and amended hereby, all of the terms and provisions of the Plan as heretofore amended shall be and remain in full force and effect.

IN WITNESS WHEREOF, the parties have caused this instrument to be executed this 1st day of March, 1973, as of November 1, 1972.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AFFILIATED WITH AFL-CIO AND ITS LOCAL 1003	NACHMAN CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 76 C 2963

NACHMAN CORPORATION,

Plaintiff,

vs.

PENSION BENEFIT GUARANTY CORPORATION,

Defendant.

MEMORANDUM OPINION

[Filed March 24, 1977]

MOTION TO DISMISS

I.

Plaintiff Nachman Corporation ("Nachman"), brought this action against the Pension Benefit Guaranty Corporation ("PBGC"), challenging the PBGC's interpretation of certain provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. ("ERISA" or "the Act"), and certain regulations issued by the PBGC based upon its interpretation of the Act.

Nachman seeks a declaratory judgment that it is not liable under §4062 of the Act, 29 U.S.C. §1362 for insufficiencies in funding resulting from its December 31, 1975 termination of the Nachman Corporation (Chicago Plant) Agreement and Pension Plan, as amended, ("the Pension Plan"), originally created in 1960 pursuant to a collective bargaining agreement between Nachman and the United Automobile, Aircraft and Agricultural Implement Workers of America ("the UAW"), and an order enjoining the PBGC from issuing a notice under

§4041(c) of the Act, 29 U.S.C. §1341(c), to the effect that the PBGC is unable to determine whether the Pension Plan's assets are sufficient to meet the benefits guaranteed under ERISA.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1331 and 1349, and 29 U.S.C. §1302(b). Pending before the Court is defendant's motion to dismiss pursuant to Rule 12(b)(6) F.R.Civ.P., for failure to state a claim upon which relief can be granted. For the reasons set forth below, defendant's motion is denied.

In accordance with the collective bargaining agreement between Nachman and UAW, Nachman agreed to establish a pension plan for certain of its hourly rate employees at its Armitage Avenue facility in Chicago. Under the Pension Plan, employee benefits were to become vested after an employee completed 15 years of service and attained age 45. If an employee with vested benefit rights left his employment before reaching age 65, he would have been eligible to receive benefits at age 65 if the plan had sufficient funds available to pay for the benefits. As a result of the Pension Plan's most recent amendments, 90 day advance notice of intent to terminate was required, which notice could be given at any time after August 31, 1975, to be effective contemporaneously with the expiration of the collective bargaining agreement.

Article V, Section 3 of the Pension Plan specifically limited Nachman's general liability for vested benefits pursuant to the plan to "only such benefits as can be provided by the assets of the Fund" created by the Pension Plan, and "[i]n the event of termination of this Plan, there shall be no liability or obligation on the part of the Company to make any further contributions" to supplement the existing funds in the plan.

The complaint alleges that on October 1, 1975, the first date upon which termination notice could be issued in accordance with the collective bargaining agreement, Nachman gave notice that it was terminating the Pension Plan as of December 31, 1975, due to the unprofitable nature of its operations at its Armitage facility.

There appears to be no question that during the term of the plan Nachman complied fully with the bargained-for funding requirements set forth in the Pension Plan, and that but for the newly created benefit provisions of ERISA and the PBGC's interpretations thereunder, Nachman could have properly terminated the Pension Plan in the manner it did with impunity. The controversy herein centers around the nature of the liability imposed by ERISA on employer-sponsors for the funding of "nonforfeitable vested benefits" in plans which were in existence prior to January 1, 1974, and which were terminated prior to January 1, 1976. Plaintiff contends that under the facts of this case Congress never intended to require post-termination funding by an employer-sponsor, since at the time the Pension Plan was terminated the nonforfeitable rights created by ERISA had not yet vested in the individual employees under the Plan. The PBGC maintains, however, that since Title IV of ERISA, which created the PBGC and plan termination insurance, became effective prior to the termination of the Pension Plan, the PBGC has jurisdiction to issue notice pursuant to §4041(c) of the Act, 29 U.S.C. §1341(c), and to proceed in accordance with the provisions of §4042 of the Act, 29 U.S.C. §1342.

II.

In enacting ERISA, Congress sought to extend pension benefit protections to the millions of employees and their dependents whose pension funds had terminated without sufficient assets to satisfy the benefit expectations of its subscribers. The Act sets safeguards for the operation of covered plans and establishes standards for the administration of pension plans in an effort to minimize terminations of pension plans and losses to beneficiaries.

Title I of ERISA was enacted for the protection of employee benefit rights, and includes an expedited vesting provi-

sion which allows pension benefits to become vested prior to an individual's having reached retirement age. Title II amends the Internal Revenue Code insofar as it relates to retirement plans and includes the requirement of minimum funding of pension plans by employer-sponsors. Title III of the Act creates the Joint Pension Task Force, and sets forth the basic administrative requirements of the Act including the imposition of fiduciary responsibility upon trustees of covered pension plans. Title IV creates the PBGC as a corporate body within the Department of Labor, whose function is to encourage the continuation and maintenance of voluntary private pension plans so as to provide for timely and uninterrupted payment of benefits to participants.

§4041(a) of the Act, 29 U.S.C. §1341(a), requires that prior to the termination of covered pension plans, notice of intent to terminate must first be filed by the employer-sponsor with the PBGC. The PBGC is then required to examine the plan and determine whether the plan's assets are sufficient to pay the guaranteed benefits under the Act. Where the assets are found to be sufficient, the plan administrator is then authorized to terminate the plan. §§4041(b) and (d), 29 U.S.C. §§1341(b) and (d). Where, however, the PBGC is unable to determine whether the plan's assets are sufficient to meet the basic benefit obligations, the plan administrator is to be so notified, §4041(c) of the Act, 29 U.S.C. §1341(c), a trustee is to be appointed to handle the termination of the plan, and the guaranteed benefits are to be paid out through both the assets of the plan and PBGC funds. §§4041(c), 4042(b) of the Act, 29 U.S.C. §§1341(c), 1342(b).

The PBGC itself is essentially a government-owned insurance agency charged with supervision over the termination process of covered pension plans, and with guarantying the payment of vested and nonforfeitable benefits to individuals covered by the plans. The financing for the PBGC comes primarily from premium assessments against employer-sponsors of pension plans, which monies are in turn invested by

the PBGC in one of the four revolving funds established by §4005 of the Act, 29 U.S.C. §1305. Additionally, however, and in an effort to foreclose employer-sponsor reliance upon and abuse of PBGC insurance protections, the Act grants the PBGC a limited right of subrogation against employer-sponsors whose pension plans are inadequately funded at the time of termination. §§4062(b) and 4068(a) of the Act, 29 U.S.C. §§1362(b) and 1368(a). See, S. Rep. No. 93-383, 93d Cong. 1st Sess. 87 (1973).

III.

In §2 of the Act, 29 U.S.C. §1001, Congress recognized that "many employees with long years of employment [were] losing anticipated retirement benefits owing to the lack of vesting provisions in such plans." In an effort to remedy that situation, Congress adopted detailed vesting provisions in §§201-211 of the Act, 29 U.S.C. §1051-1061, which provisions were also made applicable to plans already in existence. In order to allow for appropriate adjustments to those plans which were already in existence, however, Congress postponed the effective date of the vesting provisions for existing plans until "plan years beginning after December 31, 1975."

Thus, in the case of Nachman's Pension Plan, since it was in existence prior to and at the time of the passage of ERISA, and was terminated on December 31, 1975, the vesting provisions of ERISA were never applicable to it.

In setting forth the degree of benefits to be insured and guaranteed by the PBGC, Congress provided in §4022(a) of the Act, 29 U.S.C. §1322(a), that: (emphasis added).

> the [PBGC] shall guarantee the payment of all nonforfeitable benefits . . . . under the terms of a plan . . . .

Under the terms of the Nachman Pension Plan, and in accordance with the law prior to ERISA, it was possible for employee rights under a plan to be vested but subject to forfeiture as a result of underfunding. Accordingly, prior to ERISA the degree of non-forfeitability was directly related to the

degree of funding. After ERISA, however, and subject to the effective dates indicated above, benefits became nonforfeitable immediately upon becoming vested; and, in conjunction with the more liberal vesting provisions of ERISA, Congress thereby acted to substantially increase and guarantee the benefits and protections afforded individuals subject to covered plans.

The only definition of "nonforfeitable" found in ERISA appears in §3(19) of the Act, 29 U.S.C. §1002(19), which provides: (emphasis added).

> The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, *which is unconditional, and which is legally enforceable against the plan*.

Though we recognize that this definition is contained in and limited to Title I of the Act, the PBGC has not presented any persuasive reasons for not assuming a similar usage of the term "nonforfeitable" in Title IV of the Act, §4022(a), 29 U.S.C. §1322(a). Rather, as urged by Nachman, the term "nonforfeitable" appears to be used in Title IV just as it is used in Title I. We therefore hold that since the vesting provisions of ERISA were not applicable to Nachman's Pension Plan, the benefits which became vested pursuant to the Pension Plan alone were *not* nonforfeitable, and therefore not subject to guarantee by PBGC under §4022(a) of the Act, 29 U.S.C. §1322(a).

PBGC argues, however, that the express language of §4082(a) of the Act, 29 U.S.C. §1382(a) which provides for an effective date of September 2, 1974 for the plan termination and insurance program of Title IV, gives the PBGC a right, in the event of insufficient funding upon pension plan termination, to pursue the remedies provided in Title IV even if the benefit had only become "vested" in accordance with the

terms of the Pension Plan itself though not "nonforfeitable" as defined in §3(19) of the Act, 29 U.S.C. §1002(19). We disagree.

IV.

We note first that, contrary to the PBGC's assertions, a finding that the Nachman Pension Plan is not subject to the notice and subrogation provisions of Title IV of ERISA does not automatically void the first 16 months of the Title IV insurance program, for there certainly are many pension plans that began after September 2, 1974 which are subject to Title IV. Rather, we hold that based upon the particular facts of this case—where the Pension Plan was terminated prior to the date upon which benefits could become "vested" under ERISA—the beneficiaries of the Nachman Pension Plan did not have nonforfeitable interests in the plan. If at all, their vested rights were the result of rights given them under the Pension Plan, which specifically provided in Article V, Section 3 that: (emphasis added).

> Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. *In the event of termination of this Plan, there shall be no liability or obligation on the part of the Company to make any further contributions* to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid.

Under the Pension Plan, though rights to benefits may have become vested, they were specifically made subject to forfeiture in the event of inadequate funding. This was the plan bargained for by Nachman and UAW, and nothing in the Act appears to require the imposition of a more stringent vesting result.

Despite the language in §4082(a) of the Act, 29 U.S.C. §1382(a) which provides for an effective date of September 2, 1974 for Title IV of ERISA, we believe that Congress could very well have intended to extend PBGC insurance coverage to pension plan participants whose rights *had* become fully

vested (i.e. nonforfeitable), without imposing the immediate added burden on an employer-sponsor of guarantying full funding of all ERISA required benefits for those participants whose rights had *not* become fully vested, at least until such time as the vesting standards and minimum funding requirements of Titles I and II became effective.

We find nothing in the legislative history of ERISA which evidences a contrary intent. Rather, the legislative history of, and the effective dates in Title IV, reflect Congress' primary desire to provide insurance protection to individual participants as expeditiously and efficiently as possible. See, e.g., 120 Cong. Rec. S. 15749 (daily ed. Aug. 22, 1974) (Remarks of Senator Javits). Where a participant's rights had not become fully vested, as that term is used in the Act, however, the notice and subrogation provisions of Title IV are simply not applicable.

We note without deciding that consistent with the expressed Congressional goal of providing immediate insurance protection for participants in pension plans, it is possible that in cases such as the one at bar, the insurance protection through the PBGC would be available immediately even though the related funding requirements on the employer-sponsor may not yet be in effect. Though Congress certainly desired stricter control and closer supervision over pension plans, it allowed for grace periods to enable employer-sponsors to re-arrange their plans in conformity with the Act.

V.

We therefore agree with plaintiff that it would be illogical to assume that Congress intended to impose immediate funding requirements on an employer-sponsor at a time when, under the provisions of Titles I and II of ERISA, an employee's rights to those very benefits had not yet vested, and the minimum funding requirements were not yet effective.

Accordingly, we hold that plaintiff has stated a claim upon which relief can be granted, and deny defendant's motion to

dismiss. This disposition makes it unnecessary to address the constitutional issues raised by the parties in their pleadings.

ENTER:

ABRAHAM LINCOLN MAROVITZ
JUDGE

DATED: March 24, 1977

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 76 C 2963

NACHMAN CORPORATION,

Plaintiff,

vs.

PENSION BENEFIT GUARANTY CORPORATION (PBGC),

Defendant.

MEMORANDUM OPINION

[Filed June 9, 1977]

MOTION TO INTERVENE

Pending before the Court is the motion of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"), to intervene in this action as a party defendant as a matter of right under Rule 24(a) F.R.Civ.P., or in the alternative, to intervene permissibly pursuant to Rule 24(b) F.R.Civ.P. As required by Rule 24(c) F.R.Civ.P., UAW's motion is accompanied by a responsive pleading which details its asserted grounds for intervention. For the reasons set forth below, UAW's motion is granted, and we will permit its answer to be filed instanter.

Rule 24(a)(2) F.R.Civ.P. creates a threefold test for intervention of right, for instances other than those governed by Rule 24(a)(1) dealing with an unconditional statutory right to intervene. Under the Rule, upon a timely application, any party will be permitted to intervene if: (1) it claims an interest relating to the property or transaction that is the subject of the action, and (2) it is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest, unless (3) its interest is adequately represented by the existing parties. See, e.g., *Reedsburg Bank* v. *Apollo*, 508 F.2d 995, 997-998 (7th Cir. 1975); *United States* v. *Board of School Commissioners*, 466 F.2d 573, 575 (7th Cir. 1972).

In its motion, UAW asserts that it is a party and signatory to the Agreement and Pension Plan which are at the core of this litigation, and that it is the exclusive representative of the employees and retirees of plaintiff, whose past and future pension benefits are at issue in this action. Further, UAW contends that that interest it has in this litigation—as agent for and representative of the plaintiff's past and present employees—may be impaired or impeded should plaintiff prevail in this litigation, and that defendant PBGC may not adequately represent UAW's interests, since a victory by plaintiff would, according to PBGC, exonerate PBGC from any insurance guaranty liability under ERISA.

There appears to be no question that UAW has an "interest" in this litigation as that term is employed in Rule 24, and that if plaintiff is to prevail on the merits of this action, and therefore not required to supply additional funding to the pension plan, the UAW's interest in securing additional pension benefits for its members will be impaired.

The controversy herein, and the principal grounds upon which plaintiff objects to the UAW's intervention, concerns whether PBGC will adequately represent UAW's interests, and whether UAW's motion to intervene was timely. In discussing the standards for the required showing of inadequacy of representation under Rule 24(a), the Supreme Court in *Trbovich* v. *Mine Workers*, 404 U.S. 528, 538 n.10 (1972), stated:

> The requirement of the Rule is satisfied if the applicant shows that representation of his interest "may be" inadequate; and the burden of making that showing should be treated as minimal.

While not questioning the abilities of PBGC to defend against plaintiff's claims, UAW contends that the potential conflict of interest between PBGC and UAW is sufficient to meet the "inadequacy of representation" standard of Rule 24(a) as defined by the Court in *Trbovich*. We agree.

At the heart of this litigation lies the question whether plaintiff's pension plan falls within the parameters of ERISA, and whether the minimum funding requirements sought to be imposed on plaintiff and insurance obligations of the PBGC are applicable to the plan. Should plaintiff prevail on the "nonforfeitability" and minimum funding issues, PBGC has asserted that its insurance guarantees would not apply to plantiff's employees, and that those individuals would be left without a remedy. See, Transcript of Proceedings, March 24, 1977, at p. 5. Thus, despite the fact that PBGC now argues that the subject pension benefits are guaranteed, since it also contends that it will not have to pay for those benefits if plaintiff prevails, its interests are potentially adverse to those of UAW. We find plaintiff's arguments to the contrary to be unpersuasive, and inadequate to carry the shifted burden articulated by the court in *New England Petroleum Corp.* v. *Federal Energy Administration*, 71 F.R.D. 454, 458 (S.D.N.Y. 1976).

As to the issue of timeliness, we note at the outset that there are no mechanical or arithmetic means by which the timeliness of a motion to intervene may be measured. Rather, as noted by the Supreme Court in *NAACP* v. *New York*, 413 U.S. 345, 365-366 (1973):

> Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion.

Particularly in light of the Seventh Circuit's refusal to entertain an interlocutory appeal in this cause—based in part, upon the Court's desire for "the making of [an] additional record", see, Misc. No. 77-8048 (April 20, 1977)—and it appearing that neither plaintiff nor defendant would be prejudiced by UAW's intervention, and that such intervention would not delay the ultimate disposition of this action, we find that UAW's motion to intervene is timely. See, e.g., *McCausland* v. *Shareholders Management Co.*, 52 F.R.D. 521, 524 (S.D.N.Y. 1971), and *Kozak* v. *Wells*, 278 F.2d 104, 109 (8th Cir. 1960).

In light of the foregoing, UAW's motion to intervene as a party defendant is granted, and UAW will be permitted to file its answer instanter.

ENTER:

ABRAHAM LINCOLN MAROVITZ
JUDGE

DATED: June 9, 1977

[Caption Omitted In Printing]

ANSWER OF UAW

[Filed With Motion For Leave to Intervene April 5, 1977]

COMES NOW, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), by counsel, and for its Answer to the Complaint, and each paragraph thereof, says the following:

1. Admit.

2. Admit the first two sentences. As to the third sentence, no answer is required since the 1958 collective bargaining agreement speaks for itself. Admit the fourth sentence. As to the fifth and sixth sentence, no answer is required since the

documents speak for themselves. Admit the seventh and eighth sentences. In all other respects, deny.

3. No answer is required, since the document speaks for itself; but, in any event, deny.

4. Admit.

5. Admit.

6. Deny.

7. Admit.

8. No answer is required, since the document speaks for itself; but, in any event, deny.

9. Admit.

10. Admit, except deny that a termination date has been established for purposes of §§4041 & 4048, 29 USC §§1341 & 1348.

11. The UAW is presently with sufficiently accurate and up-to-date information upon which to admit or deny the allegations of §11, and therefore they are denied.

12. Deny the first sentence. No answer is required to the second sentence, as the IRC and Regulations thereunder speak for themselves; but, in any event, deny.

13. Admit the first sentence. Deny the second sentence.

14. Admit.

15. Admit.

16. Admit the first sentence. No answer is required to the second sentence, since the document speaks for itself; but, in any event, deny.

17. Deny in all respects, including each subparagraph.

18. Admit.

19. Admit the PBGC has internally determined, pursuant to §4041(c), 29 USC §1341(c), that a Notice of Insufficiency should issue. Admit the PBGC will, unless enjoined, issue

such a Notice. Admit that the PBGC seeks, or will seek to recover all or part of the determined deficiency from Nachman Corporation, pursuant to §4062, 29 USC §1362. Admit the last sentence. In all other respects, deny.

20. Admit.

DEFENSE

Plaintiff has failed to state a claim upon which relief may be granted.

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By ________________
Harold A. Katz

Attorneys for UAW

Dated: April ...., 1977.

[Caption Omitted In Printing]

MOTION FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT

[Filed April 28, 1977]

Now comes NACHMAN CORPORATION, plaintiff herein, by its attorneys, and moves the court for judgment on the pleadings or, in the alternative, for summary judgment, on the ground that the memorandum opinion of this court entered on March 24, 1977, the order entered pursuant thereto and the transcript of proceedings of March 24, 1977 (copies of which opinion, order and transcript of proceedings are attached hereto and marked Exhibits A, B and C, respectively), along with the briefs of the parties in support of and in opposition to defendant's motion to dismiss, dispose of all material issues in this matter and entitled plaintiff to judgment as a matter of law.

Respectfully submitted,

NACHMAN CORPORATION

By: ____________________
Robert W. Gettleman
One of its Attorneys

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[Caption Omitted In Printing]

MOTION OF DEFENDANT PENSION BENEFIT GUARANTY CORPORATION FOR SUMMARY JUDGMENT

[Filed June 16, 1977]

The defendant Pension Benefit Guaranty Corporation, pursuant to Fed. R. Civ. P. 56, moves this Court to grant summary judgment in its favor on the grounds that there is no genuine issue of material fact and defendant is entitled to judgment as a matter of law.

Respectfully submitted,

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E. Calvin Golumbic
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[Caption Omitted In Printing]

DEFENDANT PENSION BENEFIT GUARANTY CORPORATION'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Fed. R. Civ. P. 56(c), defendant Pension Benefit Guaranty Corporation submits the following statement of material facts as to which there is no genuine issue:

1. Plaintiff Nachman Corporation ("Nachman") is an Illinois Corporation having its principal place of business in Chicago and has carried on its manufacturing business at 4560 West Armitage Avenue in Chicago (the "Chicago North Plant"). (Compl., Para. 2.)

2. Defendant Pension Benefit Guaranty Corporation (the "PBGC") is a wholly-owned, independent government corporation charged with the administration of the plan termination insurance program established by Title IV of the Employee Retirement Income Security Act of 1974, §4001 *et seq.*, 29 U.S.C. §1301 *et seq.* (Supp. V, 1975) ("ERISA").

3. The PBGC was established, *inter alia*, to provide for the timely and uninterrupted payment of guaranteed pension benefits to participants and beneficiaries under plans to which Title IV of ERISA applies. §4002(a)(2); 29 U.S.C. §1302(a)(2). Title IV applies to certain defined benefit pension plans. §4021 of ERISA, 29 U.S.C. §1329.

4. On February 29, 1960, Nachman and the United Automobile, Aerospace and Agricultural Implement Workers of America, who represented certain hourly employees of the Chicago North Plant, entered into the Nachman Corporation (Chicago Plant) Agreement and Pension Plan (the "Plan"). (Compl., Para. 2.)

5. The Plan is a defined benefit pension plan. (Compl., Para 3.)

6. The Plan document limits the pension benefits provided by the Plan to the amount of the Plan's trust fund, to which Nachman contributed, and states that in the event of termination Nachman is not liable or obligated to make additional contributions to fund the benefits provided by the Plan. (Exhibit B to Compl. at 18; Compl. Para. 7.)

7. The Plan terminated on December 31, 1975. (Compl., Para. 10.)

8. As of December 31, 1975, the assets of the Plan's trust fund were insufficient to pay the benefits provided by the Plan which are guaranteed by the PBGC. (Compl., Para. 11.)

9. Since September 2. 1974, when Title IV become effective (§4082(a) of ERISA, 29 U.S.C. §1382(a)), the PBGC has assumed liability for approximately 136 insufficient pension plans terminating on or before December 31, 1975. (Affidavit of Joseph E. Ellinger, Para. 5 attached hereto.)

10. The total amount of plan asset insufficiency of the plans described in Paragraph 9 herein is approximately $52,785,000. (Ellinger Affidavit, Para. 7.)

11. Approximately 20,995 plan participants are receiving or will receive pension payments for benefits guaranteed by the PBGC under the plans described in Paragraph 9 herein. (Ellinger Affidavit, Para. 9.)

12. Of the plans referred to in Paragraph 9 herein, approximately 78 plans have limitation-of-liability provisions like Nachman's plan. (Ellinger Affidavit, Para. 6.)

13. The total amount of plan asset insufficiency of the plans described in Paragraph 12 herein is approximately $32,986,000. (Ellinger Affidavit, Para. 8.)

14. Approximately 12,105 plan participants are receiving or will receive pension payments for benefits guaranteed by the PBGC under the plans described in Paragraph 12 herein. (Ellinger Affidavit, Para. 10.)

HENRY ROSE/ ESQ
Henry Rose
General Counsel

E. CALVIN GOLUMBIC
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[Caption Omitted In Printing]

AFFIDAVIT OF JOSEPH E. ELLINGER

[Filed June 16, 1977]

I, Joseph E. Ellinger, being first duly sworn, depose and swear as follows:

1. I am 51 years old and reside at 5 West Glebe Rd. Apt. B-12, Alexandria, Virginia 22305.

2. Since September 2, 1974, I have been employed as Director of the Office of Program Operations of the Pension Benefit Guaranty Corporation, which is at present located at 2020 K Street, N. W., Washington, D. C. 20006.

3. Among my responsiblities as Director of the Office of Program Operations is processing all terminated insufficient pension plans to which Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") applies.

4. I am familiar with plaintiff's complaint in this lawsuit.

5. Since September 2, 1974, the PBGC has assumed liability for approximately 136 insufficient pension plans terminating on or before December 31, 1975.

6. Of these plans, approximately 78 have limitation-of-liability provisions like the pension plan involved in this lawsuit.

7. The total amount of plan asset insufficiency of the insufficient plans terminating on or before December 31, 1975, is approximately $52,785,000.

8. The total amount of plan asset insufficiency of the insufficient plans with limitation-of-liability provisions like the Nachman plan is approximately $32,986,000.

9. Approximately 20,995 plan participants are receiving or will receive pension payments for benefits guaranteed by the PBGC under all the insufficient plans terminating on or before December 31, 1975.

10. Approximately 12,105 plan participants are receiving or will receive pension payments for benefits guaranteed by the PBGC under plans with limitation-of-liability provisions like the Nachman plan.

[Caption Omitted In Printing]

UAW's CROSS-MOTION FOR SUMMARY JUDGMENT

[Filed June 16, 1977]

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), intervenor-defendant, hereby cross-moves, pursuant to F.R. Civ. Pro. 56, for summary judgment. There are no genuine issues of material fact. As more fully set out in the memorandum filed herewith, the UAW is entitled to judgment as a

matter of law because the Complaint fails to state a claim upon which relief may be granted.

This cross-motion is based on all the pleadings and files in this matter, including the Affidavit of Robert Kryvicky.

WHEREFORE, the UAW respectfully asks that the Court enter summary judgment against plaintiff, and in favor of the UAW, with costs and attorney fees against plaintiff.

[Caption Omitted In Printing]

AFFIDAVIT OF ROBERT KRYVICKY

[Filed June 16, 1977]

STATE OF MICHIGAN } ss.
COUNTY OF WAYNE }

Being first duly sworn, Robert Kryvicky says and deposes as follows:

My name is Robert Kryvicky. My office address is 8000 East Jefferson Avenue, Detroit, Michigan 48214. I am employed by the International Union, UAW, as an actuary. I am an Associate in the Society of Actuaries.

If the Pension Benefit Guaranty Corporation does not guarantee the benefits in the Nachman UAW Pension Plan, I estimate that the assets of the plan are sufficient to provide for only 35% of the accrued vested benefits for 135 employees. Stated in a different way, the average benefit that would be guaranteed by PBGC for these 135 employees is $77.00 per month but without the guarantee the average benefit that the assets could provide is $27.00.

Further, affiant sayeth not.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 76 C 2963

NACHMAN CORPORATION,
Plaintiff,

vs.

PENSION BENEFIT GUARANTY CORPORATION (PBGC),
Defendant,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Intervenor-Defendants.

MEMORANDUM OPINION

[Filed September 16, 1977]

CROSS MOTIONS FOR SUMMARY JUDGMENT

Plaintiff Nachman Corporation ("Nachman"), brought this action against the Pension Benefit Guaranty Corporation ("PBGC"), challenging the PBGC's interpretation of certain provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. ("ERISA" or "the Act"), and certain regulations issued by the PBGC based upon its interpretation of the Act.

Nachman seeks a declaratory judgment that it is not liable under §4062 of the Act, 29 U.S.C. §1362 for insufficiencies in funding resulting from its December 31, 1975 termination of the Nachman Corporation (Chicago Plant) Agreement and

Pension Plan, as amended, ("the Pension Plan"), originally created in 1960 pursuant to a collective bargaining agreement between Nachman and the United Automobile, Aircraft and Agricultural Implement Workers of America ("the UAW"), and an order enjoining the PBGC from issuing a notice under §4041(c) of the Act, 29 U.S.C. §1341(c), to the effect that the PBGC is unable to determine whether the Pension Plan's assets are sufficient to meet the benefits guaranteed under ERISA.

Prior to the motions now pending before the Court, the PBGC moved to dismiss the complaint for failure to state a claim upon which relief can be granted under F.R.Civ.P. 12(b)(6). On March 24, 1977, we issued a memorandum opinion denying the PBGC's motion. On March 28, 1977, we certified the order denying PBGC's motion to dismiss for interlocutory review pursuant to 28 U.S.C. §1292(b). The Court of Appeals for the Seventh Circuit denied PBGC's motion for leave to appeal in an order entered on April 20, 1977. By Order of June 9, 1977, we granted the UAW's motion to intervene as a defendant.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1331 and 1349, and 29 U.S.C. 1302(b). Pending before the Court is Nachman's motion for summary judgment pursuant to F.R.Civ.P. 56(a), along with separate cross-motions for summary judgment of the PBGC and the UAW, pursuant to F.R.Civ.P. 56(b). Neither party claims a genuine issue of a material fact and, accordingly, both plaintiff and defendants seek a judgment in their favor as a matter of law. For the reasons set forth below, plaintiff's motion is granted and defendants' motions are denied.

I.

In accordance with the collective bargaining agreement between Nachman and UAW, Nachman agreed to establish a pension plan for certain of its hourly rate employees at its Armitage Avenue facility in Chicago. Under the Pension Plan,

employee benefits were to become vested after an employee completed 15 years of service and attained age 45. If an employee with vested benefit rights left his employment before reaching age 65, he would have been eligible to receive benefits at age 65 if the plan had sufficient funds available to pay for the benefits. As a result of the Pension Plan's most recent amendments, 90 day advance notice of intent to terminate was required, which notice could be given at any time after August 31, 1975, to be effective contemporaneously with the expiration of the collective bargaining agreement.

Article V, Section 3 of the Pension Plan specifically limited Nachman's general liability for vested benefits pursuant to the plan to "only such benefits as can be provided by the assets of the Fund" created by the Pension Plan, and "[i]n the event of termination of this Plan, there shall be no liability or obligation on the part of the Company to make any further contributions" to supplement the existing funds in the plan.

The complaint alleges that on October 1, 1975, the first date upon which termination notice could be issued in accordance with the collective bargaining agreement, Nachman gave notice that it was terminating the Pension Plan as of December 31, 1975, due to the unprofitable nature of its operations at its Armitage facility.

There appears to be no question that during the term of the plan Nachman complied fully with the bargained-for funding requirements set forth in the Pension Plan, and that but for the newly created benefit provisions of ERISA and the PBGC's interpretations thereunder, Nachman could have properly terminated the Pension Plan in the manner it did with impunity. The controversy herein centers around the nature of the liability imposed by ERISA on employer-sponsors for the funding of "nonforfeitable vested benefits" in plans which were in existence prior to January 1, 1974, and which were terminated prior to January 1, 1976. Plaintiff contends that under the facts of this case Congress never intended to require post-termina-

tion funding by an employer-sponsor, since at the time the Pension Plan was terminated the nonforfeitable rights created by ERISA had not yet vested in the individual employees under the Plan. The PBGC maintains, however, that since Title IV of ERISA, which created the PBGC and plan termination insurance, became effective prior to the termination of the Pension Plan, the PBGC has jurisdiction to issue notice pursuant to §4041(c) of the Act, 29 U.S.C. §1341(c), and to proceed in accordance with the provisions of §4042 of the Act, 29 U.S.C. §1342.

II.

In enacting ERISA, Congress sought to extend pension benefit protections to the millions of employees and their dependents whose pension funds had terminated without sufficient assets to satisfy the benefit expectations of its subscribers. The Act sets safeguards for the operation of covered plans and establishes standards for the administration of pension plans in an effort to minimize terminations of pension plans and losses to beneficiaries.

Title I of ERISA was enacted for the protection of employee benefit rights, and includes an expedited vesting provision which allows pension benefits to become vested prior to an individual's having reached retirement age. Title II amends the Internal Revenue Code insofar as it relates to retirement plans and includes the requirement of minimum funding of pension plans by employer-sponsors. Title III of the Act creates the Joint Pension Task Force, and sets forth the basic administrative requirements of the Act including the imposition of fiduciary responsibility upon trustees of covered pension plans. Title IV creates the PBGC as a corporate body within the Department of Labor, whose function is to encourage the continuation and maintenance of voluntary private pension plans so as to provide for timely and uninterrupted payment of benefits to participants.

§4041(a) of the Act, 29 U.S.C. §1341(a), requires that prior to the termination of covered pension plans, notice of intent to terminate must first be filed by the employer-sponsor with the PBGC. The PBGC is then required to examine the plan and determine whether the plan's assets are sufficient to pay the guaranteed benefits under the Act. Where the assets are found to be sufficient, the plan administrator is then authorized to terminate the plan. §§4041(b) and (d), 29 U.S.C. §§1341(b) and (d). Where, however, the PBGC is unable to determine whether the plan's assets are sufficient to meet the basic benefit obligations, the plan administrator is to be so notified, §4041(c) of the Act, 29 U.S.C. §1341(c), a trustee is to be appointed to handle the termination of the plan, and the guaranteed benefits are to be paid out through both the assets of the plan and PBGC funds. §§4041(c), 4042(b) of the Act, 29 U.S.C. §§1341(c), 1342(b).

The PBGC itself is essentially a government-owned insurance agency charged with supervision over the termination process of covered pension plans, and with guarantying the payment of vested and nonforfeitable benefits to individuals covered by the plans. The financing for the PBGC comes primarily from premium assessments against employer-sponsors of pension plans, which monies are in turn invested by the PBGC in one of the four revolving funds established by §4005 of the Act, 29 U.S.C. §1305. Additionally, however, and in an effort to foreclose employer-sponsor reliance upon and abuse of PBGC insurance protections, the Act grants the PBGC a limited right of subrogation against employer-sponsors whose pension plans are inadequately funded at the time of termination. §§4062(b) and 4068(a) of the Act, 29 U.S.C. §§1362(b) and 1368(a). See, S. Rep. No. 93-383, 93rd. Cong. 1st Sess. 87 (1973).

III.

In §2 of the Act, 29 U.S.C. §1001, Congress recognized that "many employees with long years of employment [were] losing anticipated retirement benefits owing to the lack of vesting provisions in such plans." In an effort to remedy that situation, Congress adopted detailed vesting provisions in §§201-211 of the Act, 29 U.S.C. §1051-1061, which provisions were also made applicable to plans already in existence. In order to allow for appropriate adjustments to those plans which were already in existence, however, Congress postponed the effective date of the vesting provisions for existing plans until "plan years beginning after December 31, 1975."

Thus, in the case of Nachman's Pension Plan, since it was in existence prior to and at the time of the passage of ERISA, and was terminated on December 31, 1975, the vesting provisions of ERISA were never applicable to it.

In setting forth the degree of benefits to be insured and guaranteed by the PBGC, Congress provided in §4022(a) of the Act, 29 U.S.C. §1322(a), that: (emphasis added).

> The [PBGC] shall guarantee the payment of all nonforfeitable benefits . . . . under the terms of a plan . . . .

Under the terms of the Nachman Pension Plan, and in accordance with the law prior to ERISA, it was possible for employee rights under a plan to be vested but subject to forfeiture as a result of underfunding. Accordingly, prior to ERISA the degree of nonforfeitability was directly related to the degree of funding. After ERISA, however, and subject to the effective dates indicated above, benefits became nonforfeitable immediately upon becoming vested; and, in conjunction with the more liberal vesting provisions of ERISA, Congress thereby acted to substantially increase and guarantee the benefits and protections afforded individuals subject to covered plans.

The only definition of "nonforfeitable" found in ERISA appears in §3(19) of the Act, 29 U.S.C. §1002(19), which provides: (emphasis added).

> The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant

or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, ***which is unconditional, and which is legally enforceable against the plan*.**

Though we recognize that this definition is contained in and limited to Title I of the Act, the PBGC has not presented any persuasive reasons for not assuming a similar usage of the term "nonforfeitable" in Title IV of the Act, §4022(a), 29 U.S.C. §1322(a). Rather, as urged by Nachman, the term "nonforfeitable" appears to be used in Title IV just as it is used in Title I. We find support for this conclusion in an axiom of statutory construction, which says: "[a]n earlier specific definition may properly color a subsequent use of the same words without re-definition." ***Kent Manufacturing Corp.*** **v.** ***C.I.R.*****, 288 F.2d 812, 815 (4th Cir. 1961).**

We therefore hold that since the vesting provisions of ERISA were not applicable to Nachman's Pension Plan, the benefits which became vested pursuant to the Pension Plan alone were ***not*** **nonforfeitable, and therefore not subject to guarantee by PBGC under §4022(a) of the Act, 29 U.S.C. §1322(a).[1]**

PBGC argues, however, that the express language of §4082(a) of the Act, 29 U.S.C. §1381(a) which provides for an effective date of September 2, 1974 for the plan termination

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[1] The PBGC points out that the second sentence of §3(19) of the Act, 29 U.S.C. §1002(19) provides:

> **For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 203(a)(3).**

Relying on I.R.C. Temp. Reg. §11.411(a)-4(a), promulgated under the vesting provisions of the Act, the PBGC argues that even if the Title I definition of "nonforfeitable" applies to Title IV, a benefit "conditioned upon a sufficiency of plan assets in the event of a termination or partial termination [is] not considered to be forfeitable." However, the regulation was not applicable to pre-existing plans until after December 31, 1975. I.R.C. Temp. Reg. §410, p.15, "Labor Regulations Affecting Internal Revenue Code."

and insurance program of Title IV, gives the PBGC a right, in the event of insufficient funding upon pension plan termination, to pursue the remedies provided in Title IV even if the benefit had only become "vested" in accordance with the terms of the Pension Plan itself though not "nonforfeitable" as defined in §3(19) of the Act, 29 U.S.C. §1002(19). We disagree.

IV.

We note first that, contrary to the PBGC's assertions, a finding that the Nachman Pension Plan is not subject to the notice and subrogation provisions of title IV of ERISA does not automatically void the first 16 months of the Title IV insurance program, for there certainly are many pension plans that began after September 2, 1974 which are subject to Title IV. Rather, we hold that based upon the particular facts of this case—where the Pension Plan was terminated prior to the date upon which benefits could become "vested" under ERISA—the beneficiaries of the Nachman Pension Plan did not have nonforfeitable interests in the plan. If at all, their vested rights were the result of rights given them under the Pension Plan, which specifically provided in Article V, Section 3 that: (emphasis added).

> **Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund.** ***In the event of termination of this Plan, there shall be no liability or obligation on the part of the Company to make any further contributions*** **to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid.**

Under the Pension Plan, though rights to benefits may have become vested, they were specifically made subject to forfeiture in the event of inadequate funding. This was the plan bargained for by Nachman and UAW, and nothing in the Act appears to require the imposition of a more stringent vesting result.

Despite the language in §4082(a) of the Act, 29 U.S.C. §1381(a) which provides for an effective date of September 2, 1974 for Title IV of ERISA, we believe that Congress could very well have intended to extend PBGC insurance coverage to pension plan participants whose rights *had* become fully vested (i.e. nonforfeitable), without imposing the immediate added burden on an employer-sponsor of guarantying full funding of all ERISA required benefits for those participants whose rights had *not* become fully vested, at least until such time as the vesting standards and minimum funding requirements of Titles I and II became effective.

We find nothing in the legislative history of ERISA which evidences a contrary intent. Rather, the legislative history of, and the effective dates in Title IV, reflect Congress' primary desire to provide insurance protection to individual participants as expeditiously and efficiently as possible. See, e.g., 120 Cong. Rec. S. 15749 (daily ed. Aug. 22, 1974) (Remarks of Senator Javits). Where a participant's rights had not become fully vested, as that term is used in the Act, however, the notice and subrogation provisions of Title IV are simply not applicable.

The Court is aware, particularly in light of the affidavit accompanying the motion submitted by the UAW, that this decision may be perceived as affecting the pensions of 135 employees. Affidavit of Robert Kryvicky, UAW exhibit, ¶3. It should therefore be reiterated that this decision does not alter the terms of the collective bargaining agreement between Nachman and the UAW. The limitation-of-liability clause, Article V, Section 3 of the Pension Plan, created an expectation both in the participants of the Pension Plan and Nachman.[2] In this instance, on these facts, the advent of ERISA does nothing to disturb the contractual expectation of Nachman or its employees.

[2] We do not agree with the UAW's allegation that Article V, Section 3 of the Pension Plan was included in "the fine print" "typical of pre-ERISA defined benefit plans." UAW's Memorandum in Support of Summary Judgment at 8.

The sole issue in this case is Nachman's liability to PBGC, not the PBGC's liability to Nachman's employees. However, as we suggested in our first opinion, that consistent with the expressed Congressional goal of providing immediate insurance protection for participants in pension plans, it is a fair assumption that in cases such as the case at bar, the insurance protection through the PBGC would be available immediately even though the related funding requirements on the employer-sponsor may not yet be in effect. Though Congress certainly desired stricter control and closer supervision over pension plans, it allowed for grace periods to enable employer-sponsors to re-arrange their plans in conformity with the Act.

V.

We therefore agree with plaintiff that it would be illogical to assume that Congress intended to impose immediate funding requirements on an employer-sponsor at a time when, under the provisions of Titles I and II of ERISA, an employee's rights to those very benefits had not yet vested, and the minimum funding requirements were not yet effective.

Accordingly, plaintiff's motion for summary judgment is granted and defendants' cross-motions for summary judgment are denied. We need not address the constitutional issues raised by the parties in their pleadings.

ENTER:

ABRAHAM LINCOLN MAROVITZ
JUDGE

DATED: September 15, 1977

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
For the
NORTHERN DISTRICT OF ILLINOIS

No. 76 C 2963

NACHMAN CORPORATION

vs.

PENSION BENEFIT GUARANTY CORPORATION

JUDGMENT

[Filed September 16, 1977]

This action came on for trial (hearing) before the Court, Honorable Abraham L. Marovitz, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged summary judgment in favor of the plaintiff and against the defendants is entered.

Dated at Chicago, Illinois, this 15th day of September, 1977.

H. STUART CUNNINGHAM
Clerk of Court

By: FRANCES D'ANDRER
Deputy Clerk

OPINION OF COURT OF APPEALS FILED JANUARY 23, 1978 WAS APPENDED TO PETITION FOR WRIT OF CERTIORARI

Opinion by Judge Sprecher

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
January 23, 1979.
Before

HON. WALTER J. CUMMINGS, Circuit Judge
HON. JOHN MINOR WISDOM, Senior Circuit Judge*
HON. ROBERT A. SPRECHER, Circuit Judge

No. 77-2146

NACHMAN CORPORATION,
Plaintiff-Appellee,

vs.

PENSION BENEFIT GUARANTY CORPORATION, etc.,
Defendant,

INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Intervening Defendant-Appellant.

* Senior Circuit Judge John Minor Wisdom, of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

No. 77-2147

NACHMAN CORPORATION,
Plaintiff-Appellee,

vs.

PENSION BENEFIT GUARANTY CORPORATION, etc.,
Defendant-Appellant.

INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Intervening Defendant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-C-2963
Abraham L. Marovitz, Judge

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and were argued by counsel.

On consideration whereof, it is odered and adjudged by this court that the order of the said District Court in these causes appealed from be, and the same is hereby, REVERSED, with costs, in accordance with the opinion of this court filed this date.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1557

NACHMAN CORPORATION,
Petitioner,
v.

PENSION BENEFIT GUARANTY CORPORATION,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR UAW

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IN THE

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No. 78-1557

NACHMAN CORPORATION,
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and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR UAW

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), by counsel, respectfully pray that the Court *deny* the Petition for Writ of Certiorari.

OPINION BELOW

The opinion below, authored by Judge Sprecher, with Cummings and Wisdom, J.J.,[1] on the panel, is reported at: *Nachman Corp.* v. *PBGC & UAW*, 592 F.2d 947 (7th Cir. 1979), *reversing* 436 F. Supp. 1334 (N.S. Ill. 1977). (A 1-29).[2]

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. A defined benefit pension plan is terminated after the September 2, 1974 effective date of the guaranty provisions of ERISA,[3] 29 U.S.C. § 1322, but before the January 1, 1976 effective date of the Act's minimum vesting rules, 29 U.S.C. § 1053. The retirement benefits are vested under the terms of the plan. However, the assets of the trust are insufficient to fund them fully. PBGC guarantees the benefits, finding them "nonforfeitable" within 29 U.S.C. § 1322, and asserts statutory liability against the employer under 29 U.S.C. § 1362.

In such a termination, does the plan's disclaimer, purporting to limit vested benefit rights to the assets in the fund, render the rights not "nonforfeitable" within 29 U.S.C. § 1322, and thus not subject to a PBGC guaranty?

2. If Nachman is liable to PBGC under 29 U.S.C. § 1362, does Title IV of ERISA contravene the Due Process Clause of the Fifth Amendment?

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[1] John Minor Wisdom, J., of the Fifth Circuit, sitting by designation.

[2] The decision below is reproduced in the Appendix to the Petition, cited in the style "A 1."

[3] Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1381 (1975). The relevant portions are reprinted in the Petition, at 3-5.

COUNTERSTATEMENT OF THE CASE

The Seventh Circuit's statement[4] is both succinct and accurate. For convenience, we paraphrase it here, rather than shear the argument from Nachman's version.

Pursuant to a labor agreement with the UAW, in 1960 Nachman established a pension plan for hourly employees at its facility in Chicago. The plan provided for vesting of benefits after employees fulfilled specified age and length-of-service requirements. It is conceded that the benefits in issue were vested under the terms of the plan. As is typical of a defined-benefit plan, Nachman was required to make annual contributions to a trust fund on an actuarial basis. Those contributions were calculated to include the administrative costs, benefit liabilities accruing during the current plan year ("normal costs"), and the amount necessary to amortize the past service liability over thirty years.[5] Nachman complied with the funding obligations of the plan.

The benefit guaranty provisions of Title IV of ERISA, 29 U.S.C. § 1322, became effective September 2, 1974. On December 31, 1975, after termination of the labor agreement, Nachman terminated the pension plan. The termination accompanied the closing of the plant, and is not challenged. On January 1, 1976, the minimum vesting rules of 29 U.S.C. § 1053 would have applied to this plan.

The assets in the trust fund were insufficient to pay all the vested benefits which accrued before December 31, 1975. Those assets can provide only 35% of the accrued vested benefits. If not subject to the PBGC guaranty, the 135 retirees' benefits would be reduced ratably

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[4] 592 F.2d at 950 (A 2-3).

[5] The plan credited employees for years served prior to the establishment of the plan. "Past service liability" refers to the cost of paying monthly benefits for those years.

—from an average of $77.00 a month, to $27.00 a month.[6] Termination and (with it) the problem of insufficiency could have been avoided had Nachman "frozen" the plan, *i.e.*, maintained it by amortizing over the remainder of the funding cycle. Nachman chose, instead, to assert that Article V § 3[7] of the plan foreclosed the PBGC guaranty under 29 U.S.C. § 1322, by making the benefit rights "forfeitable." PBGC can only guarantee and assert employer liability as a result of:

> nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under the terms of a plan which terminates at a time when . . . this title applies to it. [29 U.S.C. § 1322(a), 592 F.2d at 951 (A 4)]

Nachman asked a declaration that ERISA would not guarantee, not impose liability on it for the vested, but unfunded, benefits. Nachman argued that, prior to the January 1, 1976 effective date of the minimum vesting rules, 29 U.S.C. § 1053, clauses like Article V § 3 could operate to make benefits conditional on adequate funding, and, thus, *not* "nonforfeitable." Even on Nachman's view, after that date, the minimum vesting rules would eliminate the argument by voiding such clauses.

The District Court adopted Nachman's reading, holding that Congress did not intend, until January 1, 1976, to subject employers to liability for unfunded benefits which they had disclaimed. The District Court did not reach the constitutional issue.

[6] 592 F.2d 961 n.29 (A 24).

[7] "Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. In the event of termination of th[e] Plan, there shall be no liability or obligation on the part of the company to make an further contribution to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid." 592 F.2d at 950 (A 3).

The Seventh Circuit reversed. Construing the definition of "nonforfeitable,"[8] in light of the legislative history, the Court held that fully vested benefit rights satisfied the definition,[9] without regard to inadequacy of the funding. The disclaimer is irrelevant. Indeed, as the Seventh Circuit points out, "the purpose of Title IV was to guarantee benefits that might be lost because of employer liability disclaimers." 592 F.2d at 956 (A 14). The benefits are, then, subject to PBGC guaranty, and Nachman is liable under 29 U.S.C. § 1362, as a result.

The Seventh Circuit went on to hold that PBGC's construction of the Act does not contravene the Due Process Clause. It finds a clear congressional purpose in enacting Title IV of ERISA to protect employees from the loss of vested benefits due to insufficient funds. Even applying the Contract Clause analysis of *Allied Structural Steel Co.* v. *Spannus*, —— U.S. —— (1978), 98 S. Ct. 2716, 57 L.Ed.2d 727,[10] the Court below held that

[8] § 1002(19): "The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. . . ." (A 3).

[9] *See:* 592 F.2d at 953 (A 8-10), where the Circuit parces the § 1002(19) definition, making the essential distinction that the claims are enforceable *against the plan*, as the definition requires. They simply may not be collectible because of the state of the funding, absent PBGC guaranty. Nor are they conditional. The participants have met all the conditions required of them, *i.e.*, age and service. The claims are fully vested in "technical pension language."

[10] The UAW had argued that a stricter standard governed due process analysis under the Fifth Amendment, relying on *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). The Seventh Circuit did not reach the issue of whether the Contract Clause and the Fifth Amendment impose identical, or different, restraints on legislative impairment of contracts. 592 F.2d at 959 (A 21). It used the analysis which, even in the UAW view, was most favorable to Nachman.

the imposition of retroactive liability was rationally related to the end. 592 F.2d at 958-963 (A 19-29). *Spannus* and *Alton*[11] are distinguished by the nature of the legislative findings, of the burden imposed, and of the equities and reliance interests involved. Title IV is, in addition, found to have careful limitations as to time, amount, circumstances and need—entirely absent in *Spannus.*

ARGUMENT

Title IV of ERISA has spawned a series of cases involving both statutory and constitutional issues, which are gradually working their way to decision at the Circuit level. This is the first full-fledged termination case to come to appellate decision.[12] It will certainly not be the last. There are three reasons why this is a poor vehicle for this Court to review such a new, complex statute:

First, this case involves, on Nachman's own reading, a "transitional" issue. Nachman, followed by the District Court, ties its statutory analysis to the happenstance that this plan terminated *between* September 2, 1974, and January 1, 1976. By its own terms, its argument "self-destructs" on the 1976 effective date of the minimum vesting rules. Title IV will, presumably, be applied well beyond that date. If the Court is to review this Act, it is only prudent to wait until transitional confusions have passed.

Second, the statutory issue here turns on a detailed, technical parcing of the definition in § 1002(19). The reading adopted is that of the administering agency. It

[11] *Railroad Retirement Bd.* v. *Alton Railroad,* 295 U.S. 330 (1935).

[12] *Connolly* v. *PBGC,* 581 F.2d 729 (9th Cir. 1978), *cert. den.,* —— U.S. ——, 99 S.Ct. 1278 (1979), *reversing* 419 F. Supp. 737 (C.D. Calif. 1976), did not arise out of a termination, and joined a statutory issue not relevant here.

supports, rather than interrupts, the guaranty of retirement benefits—the goal of Congress. It is premature to assume that any split will develop among the Circuits as to the meaning of this definition. The First, Third and Sixth Circuits will shortly have this issue.[13] If and when the Circuits split, the Court will have ample opportunity to grant *certiorari,* and will have the benefit of an issue ripened by the appellate discussion. To be sure, the Second Circuit has construed § 1002(19) in a Title I context. *Riley* v. *MEBA Pension Trust,* 570 F.2d 406, 409-410 (2d Cir. 1977). But despite Nachman's contrary assertion,[14] Judge Friendly's analysis is that used by the Seventh Circuit here.[15] There is no split on the issue—there is agreement.[16]

[13] *PBGC* v. *Ouimet Corp.,* —— F. Supp. —— (D. Mass. 1979), 233 B.P.R. D-1; *In Re: Matter of the Williamsport Milk Producers Co., Inc. Retirement Plan,* —— F. Supp. —— (M.D. Pa. 1978); 206 B.P.R. D-15; *A-T-O, Inc.* v. *PBGC,* 456 F. Supp. 545 (N.D. Oh. 1978); *Lear Siegler, Inc.* v. *PBGC & UAW,* —— F. Supp. —— (E.D. Mich. 1979); *Concord Control, Inc.* v. *PBGC & UAW,* —— F. Supp. —— (S.D. Oh. 1978); *DeFoe Shipbuilding* v. *PBGC,* —— F. Supp. —— (E.D. Mich. 1978), 178 B.P.R. D-15. *Williamsport Milk, A-T-O, Concord Control,* and *DeFoe* are currently on appeal. The rest will be shortly, we are informed.

[14] Petition at 17-18.

[15] *Riley* involved a forfeiture triggered by a plan provision penalizing a return to work in the industry. Riley claimed his benefits were "nonforfeitable" within § 1002(19), and thus protected against loss by the minimum vesting rules of § 1053. Riley claimed protection both before and after § 1053's January 1, 1976 effective date. The Second Circuit held that, despite the plan's provisions, the benefits were "nonforfeitable" within § 1002(19). Since Riley sued under § 1053, the Court went on to rule that, although his benefits were "nonforfeitable," he had no remedy under § 1053 prior to the January 1, 1976 effective date. He did have a remedy thereafter. 570 F.2d at 409-410, 413. Here, of course, § 1322 was effective on September 2, 1974. The analysis of § 1002(19) is unchanged, though.

[16] Nachman observes that the Seventh Circuit's decision conflicts with the District Court decision in *A-T-O* v. *PBGC,* 456 F. Supp. 545 (N.D. Oh. 1979). (Petition at 18). But, with due respect to the Northern District of Ohio, this falls well short of a Circuit split.

Third and last, the constitutional issue can await the development of further Circuit authority. The cases noted above will present the same constitutional issue to the other Circuits. A split may, or may not result. There is no need to plunge into the due process issue, particularly when it is posed in a "transitional" statutory setting. The Seventh Circuit did not rest its constitutional analysis on any asserted distinction between the Fifth Amendment and Contract Clause analysis, despite the UAW's urgings. 592 F.2d at 959 (A 21).[17] Instead, it took this Court's approach in *Spannus*, and applied it in a restrained, detailed fashion—noting, as this Court has, the marked difference between ERISA and state legislation. Time will bear out (or erase) the asserted distinctions, giving a detailed background against which the Court can better judge the rationality of the means which Congress chose in Title IV.

CONCLUSION

For the foregoing reasons, the Court should *deny* the petition.

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Dated: May 12, 1979

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[17] *See* above, n.10.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1557

NACHMAN CORPORATION,
Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR PENSION BENEFIT GUARANTY CORPORATION

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BRIEF IN OPPOSITION FOR PENSION BENEFIT GUARANTY CORPORATION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 592 F.2d 947. It is reproduced in the Appendix to the Petition and will be referred to herein as "Pet. App.". The opinion of the District Court is reported at 436 F. Supp. 1334.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. A defined benefit pension plan is terminated after the September 2, 1974 effective date of the guaranty provisions of ERISA,[1] 29 U.S.C. § 1322, but before the January 1, 1976 effective date of the Act's minimum vesting rules, 29 U.S.C. § 1053. The retirement benefits are vested under the terms of the plan. PBGC guarantees such benefits, subject to limitations not relevant here. The assets of the trust are insufficient to fund the level of benefits guaranteed by PBGC. PBGC finds the benefits "nonforfeitable" within 29 U.S.C. § 1322, thereby triggering statutory liability against the employer under 29 U.S.C. § 1362.

In such a termination, does the plan's disclaimer, purporting to limit satisfaction of vested benefit rights to the assets in the fund, render the participants' rights not "nonforfeitable" within 29 U.S.C. § 1322, and thus not subject to PBGC guaranty?

2. If Nachman is liable to PBGC under 29 U.S.C. § 1362, does Title IV of ERISA contravene the Due Process Clause of the Fifth Amendment?

COUNTERSTATEMENT OF THE CASE

The Court of Appeals accurately stated the case, and we accept its statement as our own:

> Pursuant to collective bargaining with the UAW, in 1960 Nachman established a pension plan for certain employees at its Armitage Avenue facility in Chicago. The plan terms provided for vesting of benefits after employees fulfilled specified age and length-of-service requirements. This pension plan is characteristic of "defined-benefit" plans, promising a fixed monthly benefit level for each year of serv-

[1] Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1381 (1975). The relevant portions are reprinted in the Petition, at 3-5.

> ice. As is typical of a defined-benefit plan, Nachman was required to make annual contributions to a trust fund on an actuarial basis. Those contributions were calculated by reference to administrative costs of the fund, benefit liabilities accruing during the current plan year ("normal costs"), and the amounts necessary to amortize the past service liability over thirty years. The parties do not dispute that Nachman complied fully with the funding obligations imposed by the plan.
>
> On October 1, 1975, Nachman gave timely notice to the UAW that it was terminating the pension plan effective December 31, 1975. The termination accompanied the closing of the Armitage Avenue facility, which had become unprofitable. The propriety of the termination is not challenged.
>
> It is also undisputed that the assets in the trust fund are insufficient to pay all the vested benefits which accrued before December 31, 1975. Apparently the fund assets can provide only thirty-five percent of the accrued vested benefits. Under the terms of the plan, the employees' benefits would be reduced ratably. Nachman would not be obligated to assume liability for the unfunded benefits. Article V, section 3 of the plan provides:
>
>> Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. In the event of termination of th[e] Plan, there shall be no liability or obligation on the part of the company to make any further contribution to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid.
>
> Nachman brought an action for declaratory relief to determine whether ERISA would impose any liability on it for the vested, but unfunded, benefits. The district court granted summary judgment in Nachman's favor, holding that Congress did not intend until January 1, 1976, to subject employers to liability for unfunded benefits which they had dis-

> claimed. Since Nachman terminated the pension plan prior to that date it was not found subject to statutory liability. (Pet. App. 2-3, footnote omitted).

The Court of Appeals reversed. It held that because the participants' benefits were unconditionally vested under the terms of the plan they were "nonforfeitable" within the meaning of 29 U.S.C. § 1322 and therefore guaranteed; accordingly it held that Nachman was liable under 29 U.S.C. § 1362. (Pet. App. 7-18) The court held further that as so construed ERISA does not violate the Due Process clause of the Fifth Amendment because it is a rational means to a legitimate end. (Pet. App. 19-29.)

REASONS FOR DENYING THE WRIT

Petitioner asserts that on the constitutional issue which it presents there is a conflict between the decision below and decisions of this Court, and that with respect to the statutory issue which it raises there is a "conflict in rationale" between the decision below and that of another Court of Appeals. However, the decisions of this Court on which Petitioner relies are plainly distinguishable on their facts and applied a constitutional standard which is not apposite here. Moreover, there is neither a conflict of decisions nor the asserted "conflict of rationale" between the Courts of Appeals: the Second Circuit decision on which Petitioner relies involved a wholly distinct statutory issue, and was cited with approval by the Court below in its opinion.

I. There is Not Even a "Conflict of Rationale" Between Circuits

Petitioner contends that its employees had no "nonforfeitable benefits" at the time it terminated the plan, that they therefore were not entitled to any guaranteed benefits from th PBGC under 29 U.S.C. § 1322, and that in turn PBGC could not recover anything from Nachman under 29 U.S.C. § 1362. Its theory is that the benefits were not "nonforfeitable" because the plan permitted recovery of benefits only against the assets of the fund and did not allow recovery against the employer. According to Petitioner, the decision of the Seventh Circuit, rejecting that argument, "directly conflicts with the rationale of the Second Circuit in *Riley* v. *MEBA Pension Trust*, 570 F.2d 406." (Pet. 17) Petitioner's insistence that there is a conflict of "rationale" is a tacit acknowledgement that the Court below has not "rendered a decision in conflict with the decision of another Court of Appeals on the same matter", see Rule 19 of this Court. But even Petitioner's more modest claim of a conflict is unjustified, as an examination of the true "rationale[s]" of the two Court of Appeals decisions readily reveals.

The court observed that three elements are required for benefits to be "nonforfeitable" under § 1002(19)[2]:

> the "claim" to the benefits must "arise from the participant's service," it must be "unconditional" and it must be "legally enforceable against the *Plan.*" (Pet. App. 8, court's emphasis.)

It concluded that all three elements were satisfied by the benefit claims in issue:

> The claims arise from participant service. Second, although the benefit claim is admittedly not legally enforceable against the employer under the terms of the plan, the statute requires only that the claim be enforceable against the *plan.* Nachman's employees' claims are enforceable against the plan, they simply may not be collectable. Nor is their

[2] The court rejected PBGC's position that § 1002(19) was not applicable because, *inter alia*, the definitions of § 1002 are in terms applicable only to Title I. PBGC urged that its regulation, 29 C.F.R. § 2605.6(a), 1977, governed; the court recognized that the "benefits in issue are * * * clearly 'nonforfeitable' if the PBGC definition is employed" (Pet. App. 6).

> claim against the plan conditional. All conditions placed upon the participant such as age and length of service have been met. (Pet. App. 9, court's emphasis).

The court buttressed its interpretation by reference to a leading authority in the field, and a close examination of the legislative history. (Pet. App. 9-16). That history shows *inter alia* that Congress used the terms "vested" and "nonforfeitable" interchangeably (*id.* pp. 12-14) and that it recognized that a contrary interpretation "to cover only instances in which the employer assumed liability for incompletely funded plans would import so narrow a purpose to Congress as to make the enactment of Title IV almost meaningless." (*Id.* p. 14).

In asserting a conflict of rationale between this decision and *Riley* v. *MEBA Pension Trust*, 570 F.2d 406, Petitioner correctly states that in *Riley* the Second Circuit "found that a benefit that had vested by the time the employee terminated his employment was in fact forfeitable because it was subject to a condition subsequent —the benefit would be forfeited if the employee competed with his former employer" (Pet. 17). As Judge Friendly wrote, the MEBA plan provision "places a condition on Riley's claim to the monthly benefits to which he would otherwise be entitled and makes his claim legally unenforceable *against the Plan*; it thus constitutes a forfeiture within the meaning of ERISA." (570 F.2d at 409, emphasis added.) The Seventh Circuit agreed with this "rationale":

> Some conditions on vested benefits related to requirements imposed on the participants might render the benefits forfeitable, at least until 1976 when Title I would invalidate such conditions. See, *e.g.*, the benefit rights in *Riley* v. *MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977). In this case, the vesting was unconditional. (Pet. App. 9, n.7.)

Curiously, Petitioner fails to mention the Seventh Circuit's discussion of the opinion which is the basis of the

supposed "conflict". And while Petitioner also points to a District Court decision which reached a different result, that is plainly not sufficient ground for invoking this Court's jurisdiction. Particularly in light of the thorough analysis of Judge Sprecher's opinion for the Court of Appeals in this case, there is no reason to anticipate that the Courts of Appeals will be unable to resolve this statutory issue without need for recourse to this Court.

II. The Constitutional Issue Raised by the Petition is Insubstantial

Following *Usery* v. *Turner Elkhorn Mining*, 428 U.S. 1, (*Turner Elkhorn*)[3] the Court of Appeals determined

[3] In *Turner Elkhorn*, this Court upheld Congressional imposition of liability on coal industry employers to compensate employees suffering from black lung disease with respect to employees who had terminated prior to the effective date of the Black Lung Benefits Act of 1972.

The Court began its analysis by reaffirming that

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. (428 U.S. at 15)

Then turning to the precise issue of the constitutionality of legislation with retrospective effect, the Court said (*id.* at 16-17):

> * * * And it may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. (Citations omitted) This is true even though the effect of the legislation is to impose a new duty or liability based on past acts. (Citations omitted)
>
> It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.

Applying this principle, the Court in *Turner Elkhorn* concluded that "the imposition of liability for the effects of disabilities bred in

that the standard to be applied in adjudicating whether ERISA violates the Due Process clause is whether the legislation represents a rational means to a legitimate end. And the court elaborated the "rationality" standard in the following illuminating passage:

> Application of the factors relevant to judicial assessment of rationality, as distilled from these and other precedents, indicates that Title IV satisfies Due Process. Rationality must be determined by a comparison of the problem to be remedied with the nature and scope of the burden imposed to remedy that problem. In evaluating the nature and scope of the burden, it is appropriate to consider the reliance interests of the parties affected, *Allied Structural Steel Co.* [v. *Spannaus,*] at 4890-91; *Adams Nursing Home of Williamstown, Inc.* v. *Mathews*, 548 F.2d 1077, 1080-81 (1st Cir. 1977); whether the impairment of the private interest is effected in an area previously subjected to regulatory control, *Allied Structural Steel Co.*, 46 U.S.L.W. at 4891, *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 91 (1958); the equities of imposing the legislative burdens, *Alton Railroad*, 295 U.S. at 354; *Turner Elkhorn Mining*, 428 U.S. at 19, and the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. *W. B. Worthen Co.*, 292 U.S. at 434; *Allied Structural Steel Co.*, 46 U.S.L.W. at 4891. It must be emphasized that although these factors might improperly be used to express merely judicial approval or disapproval of the balance struck by Congress, they must only be used to determine whether the legislation represents a rational means to a legitimate end. *See Turner Elkhorn Mining*, 428 U.S. at 18-19. (Pet. App. 23, footnote omitted.)[4]

the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor * * *", 428 U.S. at 18, quoted at Pet. App. 22.

[4] It is clear from the foregoing that Petitioner errs in stating that "the Seventh Circuit mentioned several tests which it believed

The Court of Appeals then applied these factors to ERISA, which it also compared to the legislation which had been struck down in the cases on which Nachman bases its Petition, *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1934), (*Alton*), and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), (*Allied*). Rather than reiterate all the points of difference which the court below found, we point out the most significant.

First, the Court observed that Congress viewed it "as an abuse of the private pension system in need of correction" that due to plan termination about 20,000 workers a year lost vested pension benefits which they had "'anticipated'" would provide retirement security. Thus, "Congress perceived a widespread problem of national importance", in contrast with the "extremely narrow focus" of the Minnesota statute. See 438 U.S. at 248, distinguishing *Home Building & Loan Ass'n.* v. *Blaisdell*, 290 U.S. 398, 445.

Second, unlike the legislation struck down in the *Alton* and *Allied* cases, Title IV of ERISA imposes liability on employers only with respect to employees whose right to a pension had already vested under a pension plan; it did not award a pension to any person not otherwise eligible. This difference, as the court below recognized (Pet. App. 24-26), is doubly significant. There is a lesser interference with the employer's reliance interest than under the Minnesota Act (compare 438 U.S. at 245-246) and ERISA vindicates substantial countervailing employee expectations which would otherwise be disappointed because the employer has terminated the plan, whereas

might apply to the judicial scrutiny of ERISA" (Pet. 14). The test the Court employed below was "means-end rationality", Pet. App. 21, 23. What Petitioner describes as alternative tests (Pet. 14-15) are factors the Court considered in determining whether the legislation is rational.

"Minnesota did not act to protect any employee reliance interest demonstrated on the record." (*Id.* at 246, n.18).[5]

Lastly, the Court of Appeals attached particular importance to Congress' attempt in ERISA "to moderate the impact of the liability imposed. Title IV provisions represent a rational attempt to impose liability only to the extent necessary to achieve the legislative purpose." (Pet. App. 27). The Court explained (*id.* at 27-28):

> Congress concluded that it was necessary to insure unfunded vested benefits and established a federal corporation for that purpose. However, it was also determined that it would not be possible to maintain an effective insurance program without imposing some liability on employers. The abuses employer liability was designed to cure included terminations motivated by a desire to avoid the continued burden of funding. III LEGISLATIVE HISTORY [of ERISA] at 4741 (remarks of Sen. Williams); II LEGISLATIVE HISTORY at 3382 (remarks of Rep. Gaydos). Congress was also concerned that without the risk of liability, employers might use promises of higher retirement benefits for bargaining leverage, knowing that the PBGC would be required to fulfill the promise. S. REP. No. 93-383, I LEGISLATIVE HISTORY at 1155. It was also believed that to impose liability would cause employers to assume a more responsible funding schedule. II LEGISLATIVE HISTORY at 1873 (remarks of Sen. Griffin). These first two considerations would not have been relevant in the Minnesota scheme because no agency was established to assume primary responsibility for the payment of benefits.
>
> Acknowledging that employers on the verge of bankruptcy would be unlikely to terminate pension plans solely to take advantage of termination insurance, Congress provided net worth limitations on the amount of potential liability. 29 U.S.C. § 1362. Congress also devised other provisions to temper the burdens imposed. Employers will not necessarily be liable for the full amount of benefits promised in the plan, since Congress set a level on the amount of benefits guaranteed. 29 U.S.C. § 1322(b)(3). In Section 1323 Congress required the PBGC to provide optional insurance to an employer who desires to protect against this contingent liability. Finally, Title IV grants the PBGC discretion to arrange reasonable terms for the payment of liability. 29 U.S.C. § 1367.[6]

In sum, the court below was fully justified in concluding that ERISA is rational and therefore constitutional in imposing liability on Nachman and others in its position, and in concluding further that ERISA differs decisively from the legislation struck down in *Alton* and *Allied*.

B. Petitioner nowhere acknowledges its burden of showing that Congress could not rationally require it to bear a limited liability as part of the statutory guaranty scheme to guarantee pension benefits to employees who would otherwise be deprived of their vested right to a pension by termination of the plan. Petitioner does not assert that imposition of liability on it is irrational, much less show that it is so. Thus, petitioner has failed to make even the minimal showing necessary to support a claim that the constitutional issue is sufficiently substantial to merit this Court's attention. Instead, Peti-

[5] Nachman characterizes as "startling" the Court of Appeals' "finding" that "the 'employees' reliance interest in vested benefits outweighs the employer's reliance on prior funding'"; according to Nachman, "the benefits at issue were not promised under the terms of the Plan, but only as the Plan was later affected by ERISA" (Pet. 15). But Nachman is clearly wrong, since the "vested benefits" on which employees relied are precisely and exclusively those which the employees had been "promised under the terms of the plan".

[6] ERISA contains additional protections which the Court did not mention. See pp. 13-14, *infra*.

tioner invokes two constitutional principles which it says are established by the *Alton* and *Allied* cases. But it is clear that both constitutional rules which Petitioner invokes are entirely spurious.

First, Petitioner says that *Alton* and *Allied* "stand for the proposition that the Constitution forbids legislation which imposes a new liability on employers to pay additional compensation to its employees for work which has been fully performed and compensated." (Pet. 13.) Petitioner errs for two reasons: First, those cases did not apply the "rationality" standard which governs here.[7] Second, what the Court meant in those cases by forbidden "additional compensation" was a legislative determination that individuals would be entitled to a pension who had not achieved eligibility under any pension plan. See 295 U.S. at 348-354; 438 U.S. at 246-247. In contrast, Title IV, insofar as it is in issue here, requires only that the employer be subject to liability in connection with benefits that had vested under the plan, but could not be paid from funds in the plan at termination.

Second, Nachman asserts that even if "the imposition of new liability for past service were permissible, due process requires that Nachman be given the opportunity to avoid that liability." (Pet. 14) In deriving this proposition from *Allied,* Petitioner fails once again to appreciate the significance of the fact that *Allied* arose under the Contracts Clause. It is entirely clear that the absence of a grace period was deemed significant by the Court because the case arose under the Contracts Clause. In this connection, the Court said:

[7] The "rationality" standard was again declared to be controlling in passing on economic regulations under the Due Process Clause in a case decided just two days before *Allied, Duke Power Co.* v. *Carolina Env. Study Group,* 438 U.S. at 59, 83, quoting *Turner Elkhorn*; see also *id.* at 88, n.32.

> Thus, the statute in question here nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability in potentially disabling amounts. (438 U.S. at 247.)

And, after its reference to "grace periods" under ERISA (see n.9, *infra*), this Court continued:

> Yet there is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem. (*Id.*)[8]

Although the absence of an opportunity to escape legislation which materially affects the parties' bargain was deemed pertinent in Contracts Clause analysis, it does not render legislation irrational. Here, it was entirely sensible for Congress to make termination liability applicable immediately on the enactment of ERISA, because an automatic grace period would have invited the premature termination of thousands of plans, thereby exacerbating the problem in the course of trying to cure it. Rather than to adopt that self-defeating course, Congress provided relief for the truly needy by authorizing the PBGC for nine months after the enactment of ERISA to waive or limit employer liability where "necessary to avoid unreasonable hardship in any case in which the employer was not able, as a practical matter, to continue the plan." (29 U.S.C. § 1304(f)(4).[9] Moreover, the deci-

[8] This sentence strongly suggests that the absence of a grace period would not by fatal even under the Contracts Clause if the disruption *is* "necessary to meet an important general social problem."

[9] Nachman seizes on footnote 23 of this Court's opinion (438 U.S. at 249) in *Allied* where the Minnesota Private Pension Benefits Protections Act was contrasted with ERISA, and characterizes it as a "holding" that Congress "allowed phase-in grace periods during which employers could terminate plans without further liability", which the decision below "squarely contradicts" (Pet. 15). A "holding" is just what the referenced footnote is not, because the

sion to terminate is voluntary. Thus, Nachman could have avoided the imposition of lump-sum liability under ERISA while cutting off additional benefit accruals. Such a cut-off, or plan "freeze", is not an insurable event involving PBGC that triggers imposition of liability under 29 U.S.C. § 1362. Nachman could then have continued to fund previously accumulated accruals on the same basis as before.

Nachman contends that the effective date for the new funding and vesting standards for *plans* under Title I should also have been the effective date of liability for *employers* under Title IV in connection with benefits to employees vested under the plan without recourse to the ERISA standards. Petitioner does not state why Congress should have equated the effective dates of these entirely distinct regulations; more to the point, it does not even *assert* that "the legislature has acted in an arbitrary and irrational way" in choosing the course which Petitioner would strike down as a violation of due process, see *Turner Elkhorn*, 428 U.S. at 15.

meaning of ERISA was not at issue in *Allied*. This doubtless explains why the Court's description of ERISA is not entirely precise in saying that at "the outset ERISA did not go into effect at all until four months after it was enacted, 29 U.S.C. § 1144 (1976 ed.)". The cited section is the anti-preemption provision of ERISA, and the four-month delay in its applicability does not extend to the entire Act. The further statement in the *Allied* footnote, that the funding and vesting requirements were delayed for an additional year, is correct; these requirements are contained in Title I, for which the sections there cited (29 U.S.C. §§ 1086(b) and 1061(b)(2)), provide the effective dates.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be denied.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONER NACHMAN CORPORATION

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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1557

NACHMAN CORPORATION,

Petitioner,

v.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, 592 F.2d 947 (7th Cir. 1978), appears in the Appendix to the Petition for Certiorari. The opinion of the United States District Court for the Northern District of Illinois, granting summary judgment, which was reversed by the court of appeals, appears at 436 F. Supp. 1334, and is printed in the Appendix at p. 76. An earlier opinion of the district court, denying the PBGC motion to dismiss, is printed in the Appendix at p. 53.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 23, 1979. Jurisdiction of the courts below was based upon 28 U.S.C. §§ 1331 and 1339, and 29 U.S.C. § 1302(b). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether an employer, which lawfully terminated a pension plan prior to the effective date of the minimum vesting and funding standards imposed by ERISA (hereinafter defined), is required to continue to fund a pension plan to provide payments to participants for which the employer was not contractually liable.

STATUTES INVOLVED

(Reprinted Verbatim In Addendum Hereto)

Statutes:

Internal Revenue Code of 1954 (26 U.S.C. 1964 ed.) [prior to amendment by ERISA]

Section 401(a)(2)
Section 401(a)(4)
Section 401(a)(7)
Section 402(a)(1)
Section 402(a)(2)
Section 404(a)

Internal Revenue Code (26 U.S.C., 1978 ed.) [after amendment by ERISA]

Section 410(a)(1)(A)(ii)
Section 411(a)(2)
Section 412(b)(3)

Title 29, United States Code:

Section 1002(19)
Section 1052(a)(1)(a()(ii)
Section 1053(a)
Section 1061(b)(2)
Section 1082(b)(3)
Section 1086(b)
Section 1322(a)
Section 1362(b)
Section 1381(a)

Regulations:

Treas. Reg. § 1.411(a)-4, 26 CFR § 1.411(a)-4 (1978)
29 C.F.R. § 2605.6(a)

STATEMENT OF THE CASE

This declaratory judgment action[1] arises from the determination by respondent Pension Benefit Guaranty Corporation ("PBGC") that the Employee Retirement Income Security Act of 1974, 88 Stat. 929 (1974), 29 U.S.C. §§1001-1381 (1975) ("ERISA"), compels petitioner Nachman Corporation, an Illinois corporation ("Nachman"), to continue to fund a lawfully terminated collectively bargained pension plan despite contrary provisions in the Plan, including an express limitation of Nachman's liability.

The Plan at issue (hereinafter the "Nachman Plan" or the "Plan"), was established in 1960 pursuant to a collective bargaining agreement between Nachman and the International Union, United Automobile Aerospace & Agricultural Implement Workers of America (the "UAW"). In return for the services performed by its employees, Nachman, as part of a compensation package of wages, pension and other benefits, agreed to contribute to a pension plan a certain number of cents per hour worked for each employee. Under the Plan, Nachman's obligation to make annual contributions to a trust fund was translated into an actuarial formula calculated so that benefits based on current services were fully funded each year the Nachman Plan was in existence, and benefits based on service rendered before the Plan was adopted would not be fully funded unless the Plan was in existence 30 years.[2] As acknowledged by the Seventh Circuit, "The parties do not dispute that Nachman complied fully with the funding obligations imposed by the Plan."[3]

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[1] Nachman filed a declaratory judgment action against the PBGC alone. The UAW subsequently intervened as a defendant. The case was decided on cross motions for summary judgment.

[2] Article IV § 2(a) of the Plan; App. 22-23.

[3] Appendix to Petition, p. 2 (The citations to the opinions below refer to the Appendix and Appendix to the Petition for Certiorari, rather than the published opinions.)

Eligibility to receive benefits under the Plan was based on age and seniority. Employees completing ten years or more of service who retired at or after age 65 were eligible to receive "normal" retirement benefits. The Plan also provided for various "early" retirement benefits for employees completing ten years who retired between ages 60 and 65, and employees completing 15 years who terminated between ages 45 and 60.[4]

The Nachman Plan expressly provided that the benefits payable to participants were conditioned on the sufficiency of the funds contributed by Nachman and the accumulated earnings thereon:

> "Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. In the event of termination of th[e] Plan, there shall be no liability or obligation on the part of the Company to make any further contribution to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid."[5]

Under its terms, the Plan could be terminated, upon 90 days' notice, after the collective bargaining agreement expired.[6] The Plan also provided that upon termination, the contributions previously made by Nachman constituted a "complete discharge of the Company's financial obligation."[7] In addition, although the Plan provided that it could be amended to comply with changes in federal or state law, no modification or amendment was permitted which "would, in any manner, change the amount of contributions to be made by [Nachman]."[8]

The Plan also provided for a system of priority for the payment of benefits if the Plan was terminated and funds

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[4] Article VII, § 1 of the Plan, App. 28.

[5] Article V, § 3 of the Plan, App. 24.

[6] Article X, §§ 1, 2 of the Plan, as amended, App. 31,52.

[7] Article IV, § 5 of the Plan, App. 23.

[8] Article IX, § 1(b) of the Plan, App. 31.

were distributed before it was fully funded. Those priorities allocated such funds as remained at termination to the employees based on age and seniority. To the extent no assets were available to fund the benefits of a specific age and seniority category, such benefits were to be forfeited.[9]

Prior to ERISA, the applicable provisions of the Internal Revenue Code (the "1954 Code") and Illinois law permitted tax-qualified pension plans to provide, and Nachman agreed to provide, that the plan could be terminated unilaterally and thereupon contributions would cease.[10] Benefits would then be paid to participants from the funds already contributed and for which the employer received a deduction on its income tax return. Only the benefits which were fully funded, and for which the employer had taken a tax deduction, were required to be nonforfeitable. This prevented such funds from reverting to the employer and insured that such funds would be paid to the employees.

Once fully implemented, ERISA established a number of requirements for plans to provide nonforfeitable benefits beyond those fully funded: after ERISA, certain benefits could not be forfeited due to early termination of employment or of the plan. In addition, minimum funding obligations were required to be undertaken by the employer under Titles I and II of ERISA and the PBGC was established by Title IV to insure the payment of benefits upon plan termination. ERISA did not, however, require a plan to provide these truly nonforfeitable benefits upon its enactment in 1974. Instead, the requirements to provide nonforfeitable benefits were phased in to allow employers time to plan appropriate courses of action to deal with the requirements of the new Act. See ***Allied Structural Steel Co.* v. *Spannaus***, 483 U.S. 234, 249 (1978); ***City of Los Angeles* v. *Manhart***, 435 U.S. 702, 721 (1978) (discussed at pp. 35-6, 39-40, infra).

[9] Article X, § 3 of the Plan, App. 32-33.

[10] Int. Rev. Code of 1954, ch. 1, § 401(a)(7); ***Baake* v. *General American Trans. Corp.***, 351 F.Supp. 962 (N.D. Ill. 1972).

Thus, under Titles I and II of ERISA, every plan such as the Nachman Plan was required to be amended for plan years beginning on or after January 1, 1976 to provide that a participant's benefits become nonforfeitable after he completes a certain length of employment. 29 U.S.C. §§ 1053(a), 1061(b) (2). Nachman's first contribution to meet the new minimum funding requirements imposed by ERISA would have been for the plan year beginning January 1, 1976. 29 U.S.C. §§ 1082(b) (3), 1086(b).

Relying on this timetable, on October 1, 1975, Nachman, which was closing its Chicago plant due to unprofitable operations, gave timely notice to the UAW that it was terminating the Plan effective December 31, 1975. At that time, the assets of the fund established under the Plan were sufficient to pay all normal and a portion of the early retirement benefits (to employees of ten years or more who had retired at or after age 65, and to employees of ten years who retired between 60 and 65), but were insufficient to pay retirement benefits to those employees who terminated employment prior to age 60 and had not reached that age at the time the Plan terminated.[11] Nachman could not have terminated the Plan prior to October 31, 1975 because, under the provisions of the Nachman Plan, termination was not permitted during the term of the collective bargaining agreement which expired on that date.[12] As the court below acknowledged, "The propriety of the termination is not challenged."[13]

The effect of such termination on Nachman, however, is indeed challenged. Although the parties and the court below conceded that Nachman ***could not*** have terminated the Plan prior to October 31, 1975, and although Congress allowed

[11] App. 5, 71, 78.

[12] Article IX, § 2 of the Plan, as amended by Amendment No. 3 to the Plan, App. 31-32, 52.

[13] Appendix to Petition, p. 3.

a grace period to January 1, 1976 to amend such plans to provide nonforfeitable benefits and eliminate limitations on benefits such as those at issue in this case, the court of appeals (reversing the district court) found (1) that the benefits provided under the Plan, which were expressly conditioned upon sufficiency of Plan assets, were nonforfeitable under ERISA prior to 1976, and (2) that the express terms of the Plan had been retroactively amended by ERISA to impose liability for continued funding where no such liability had previously existed, even though the Plan was properly terminated before 1976. The court further held that such an interpretation did not violate the due process clause of the fifth amendment to the United States Constitution.[14]

The court held, first, that the definition of "nonforfeitable" contained in section 3(19) of Title I of ERISA (29 U.S.C. § 1002(19)) applies to the use of that term in Title IV, which governs the PBGC. This is important since Nachman is liable to the PBGC only for benefits which are nonforfeitable. A benefit or a claim to a benefit is "nonforfeitable" under Section 1002(19) only if it "is unconditional, and . . . is legally enforceable against the plan." Although the finding that the section 1002(19) definition applies to Title IV was in accord with the position taken by the district court and Nachman, the court of appeals held that the benefits at issue were "nonforfeitable" under the definition, despite the fact that those benefits were limited to Plan assets at termination.

Nachman timely filed its petition for certiorari and this Court granted that petition on June 18, 1979.

[14] This Court, in granting certiorari, limited the issues to only the interpretive question.

SUMMARY OF ARGUMENT

Nachman's position in this action is grounded in logic and fairness. In 1960, Nachman and the UAW established the Nachman Plan, which contemplated that if the Plan existed for thirty years current benefits and those based on past services provided by the Plan would have been funded by Nachman's annual contributions. The Plan, which provided for termination by either party, was terminated after only fifteen years, resulting in Plan assets insufficient to fund the benefits for those employees who terminated employment before age 60.

Prior to the effective date of ERISA, employees and unions were permitted to include terms in plans which precluded liability by the employer for contributions beyond those bargained for and required during the plan's existence, and which limited recovery of benefits to the assets remaining at termination. Collective bargaining agreements could provide that an employer, as part of a wage-package, would contribute a given amount each year to a pension plan and that, upon the plan's termination, its assets would pass to employees with greatest seniority. The Nachman Plan contained such provisions.

Titles I and II of ERISA required the elimination of such provisions for plan years beginning on or after January 1, 1976. Nachman properly terminated its Plan on December 31, 1975, before it was required to provide nonforfeitable benefits. At the time Nachman terminated the Plan, Title IV of ERISA was already in effect, establishing the PBGC to insure nonforfeitable benefits upon plan termination. Since the benefits provided in the Nachman Plan were conditioned upon sufficiency of assets at termination, and thus not nonforfeitable, the PBGC did not insure and Nachman was not liable for continued funding of these benefits.

The ruling below reached a contrary result because the court of appeals held that the benefits conditioned upon suffi-

cient funding were nonforfeitable, as that term is defined in Title I of ERISA. Since the PBGC insures nonforfeitable benefits at plan termination after June, 1974, and since employers are liable to reimburse the PBGC for all benefits insured for plans terminating after September 2, 1974, the court held that Nachman was liable to the PBGC for continued funding.

The court of appeals erred. The benefits were not nonforfeitable since they were expressly conditioned on the sufficiency of assets remaining in the Plan at termination. They were not "unconditional and . . . legally enforceable against the Plan," as required by the ERISA definition of "nonforfeitable." The PBGC was required to insure nonforfeitable benefits under the terms of a plan and the benefits under the terms of the Nachman Plan could and would be lost unless they were fully funded. So conditioned, they were not enforceable against either the Plan or the employer.

The plain language of the statute, the pre-ERISA law, and the legislative history of ERISA compel this conclusion. To hold otherwise would result in an immediate, retroactive imposition of liability to pay for past-rendered services, despite the clear congressional intent not to impose immediately such harsh burdens on employers, as evidenced by the grace periods provided in ERISA. Congress never intended, and this Court should not permit the result imposed by the decision of the court of appeals.

ARGUMENT

I

HISTORICAL PERSPECTIVE

Prior to the enactment of ERISA on September 2, 1974, the only statute which influenced the substantive provisions of pension plans was the 1954 Code. The 1954 Code and the regulations and rulings promulgated thereunder set forth the standards under which an employer could establish a retirement plan and receive a current income tax deduction for contributions thereto. The 1954 Code also provided that the income earned on the assets held by the plan would be income tax-free and employees would not be required to include any benefits in their income for tax purposes until they actually received payment.[15] Other than the 1954 Code, prior to ERISA, the common law of contracts constituted the only law governing pension agreements between employers and employees.

The 1954 Code focused on three basic issues in determining whether a plan was qualified: (1) contributions were required to be made to a separate trust and the employer was not permitted to recover any monies from the trust until all benefits of the plan were satisfied;[16] (2) the plan could not discriminate in favor of officers, shareholders, supervisors or highly compensated employees with regard to pension benefits;[17] and (3) upon termination of the plan or complete discontinuance of contributions, the rights of employees to benefits "to the extent funded" became nonforfeitable to ensure that no funds reverted to the employer unless all benefits were paid.[18]

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[15] Int. Rev. Code of 1954, ch. 1, §§ 404(a), 402(a)(1) and (2), 68A Stat. 135-142 (now I.R.C. §§ 404, 402).

[16] Int. Rev. Code of 1954, ch. 1, § 401(a)(2), 68A Stat. 134 (now I.R.C. § 401(a)(2)).

[17] Int. Rev. Code of 1954, ch. 1, § 401(a)(4), 68A Stat. 135 (now I.R.C. § 401(a)(4)).

[18] Int. Rev. Code of 1954, ch. 1, § 401(a)(7), as amended by P.L. 87-792, § 2, 76 Stat. 809 (now I.R.C. § 411(d)(3)).

The concept of "vesting" was adopted by the Internal Revenue Service to prevent discrimination in favor of highly paid officers and shareholders by requiring plans to provide a benefit, to the extent funded, to all those who reached the retirement age set forth in the plan. In addition, to avoid the employer's firing rank and file employees before retirement age without paying the benefits which had already been funded and for which the employer had already received a tax deduction, the IRS, under its anti-discrimination rules, required in certain cases that some benefit be paid to employees who were terminated before retirement age if they had worked for the employer a given number of years and funds were sufficient to do so.[19]

A vested benefit, prior to ERISA, did not create a contractual obligation between the employee and the employer or the plan with regard to its payment. Rather, the concept of vesting was adopted by the Internal Revenue Service to insure that the contributions for which an employer received an income tax deduction were not diverted to pay greater benefits to the higher paid employees. In fact, prior to ERISA a vested benefit could be forfeited for nondiscriminatory purposes, such as certain conduct against the interests of the employer.[20] To prevent discrimination, the Internal Revenue Service often required companies with large employee turnover experience, such as professional service corporations, to provide vested benefits prior to retirement age, in order to obtain prior Internal Revenue Service qualification approval.[21] Under collective bargaining agreements, vested benefits often were provided in plans, such as the

[19] See n. 47, *infra* at p. 27.

[20] See discussion *infra* at p. 27.

[21] Part 5(c), I.R.S. Publication No. 778 (1972). In order to ensure the advantageous tax treatment of a tax qualified plan, employers often submit plans to the Internal Revenue Service for prior approval. The Internal Revenue Service may use stricter standards in granting approval than are required by statute.

Nachman Plan, in order to ensure that older employees with seniority received the funds in the plan in the event of termination of employment before retirement age.

Rather than merely concentrating on when an income tax deduction should be available to an employer, ERISA, after all its provisions became effective, created a private pension system, ensuring that all employees who worked for companies sponsoring plans would, after a minimum period of service, receive certain benefits. ERISA contains four titles:

Title I,[22] "Protection of Employee Benefit Rights," is divided into five Parts, and sets forth substantive provisions that all retirement plans (whether or not tax-qualified) must contain:

Part 1,[23] "Reporting and Disclosure," covers reporting and disclosure requirements (effective date: January 1, 1975),

Part 2,[24] "Participation and Vesting," provides participation and minimum vesting requirements, precluding conditioning payment on sufficient assets at termination (effective date: plan years beginning on or after January 1, 1976),[25]

Part 3,[26] "Funding," provides minimum funding obligations for all benefits provided (effective date: plan years beginning on or after January 1, 1976),

Part 4,[27] "Fiduciary Responsibilities," regulates certain conduct of plan administrators (effective date: January 1, 1975), and

[22] ERISA §§ 2-514, 29 U.S.C. §§ 1002-1144 (1975).

[23] ERISA §§ 101-111, 29 U.S.C. §§ 1021-1031 (1975).

[24] ERISA §§ 201-211, 29 U.S.C. §§ 1051-1061 (1975).

[25] The effective dates noted in parts 2 and 3 of Title I are those applicable to plans in existence on September 2, 1974.

[26] ERISA §§ 301-306, 29 U.S.C. §§ 1081-1086 (1975).

[27] ERISA §§ 401-414, 29 U.S.C. §§ 1104-1114 (1975).

Part 5,[28] "Administration and Enforcement," concerns both criminal and civil enforcement (effective date: January 1, 1975).

Title II,[29] "Amendments to the Internal Revenue Code Relating to Retirement Plans," amends the 1954 Code. Certain of the amendments to the Code have the effect of requiring tax-qualified plans to adopt the same participation, vesting and funding provisions as contained in Title I.

Title III,[30] "Jurisdiction, Administration, Enforcement, Joint Pension Task Force, Etc.," is concerned with the respective jurisdictions of the Department of Labor and Department of Treasury regarding regulation and enforcement of ERISA.

Title IV,[31] "Plan Termination Insurance," creates an insurance carrier, the PBGC, to insure against the loss of benefits arising from plan termination. Premiums are to be paid by insured plans. The PBGC insurance guarantees all nonforfeitable benefits under the terms of a plan (with certain limitations not relevant hereto). If assets of a plan are insufficient at termination to pay nonforfeitable benefits, the PBGC will pay the excess and has a right of subrogation therefor against the employer. Various effective dates are provided, the earliest of which is July 1, 1974 for certain coverage.

With the enactment of ERISA, the Internal Revenue Service requirements as to when a contribution is tax deductible and the contractual bargaining powers of employers and employee representatives no longer jointly determine the substantive provisions of retirement plans. ERISA established a private pension system by requiring that in general, all employees of a plan sponsor *must* become participants after they are employed for one year,[32] and all plans must provide

[28] ERISA §§ 501-514, 29 U.S.C. §§ 1131-1144 (1975).

[29] ERISA §§ 1011-2008, I.R.C. §§ 401-415.

[30] ERISA §§ 3001-3042, 29 U.S.C. §§ 1201-1242 (1975).

[31] ERISA §§ 4001-4081, 29 U.S.C. §§ 1301-1381 (1975).

[32] ERISA § 202(A)(1)(a)(ii), 29 U.S.C. § 1052 (1975); I.R.C. § 410(a)(1)(A)(ii).

nonforfeitable benefits for all participants under a timetable which may be no less restrictive than any of the three schedules set forth in the statute.[33] In addition, ERISA adopted standards for funding pension plans which for the first time require annual contributions to cover the actuarially determined cost of funding for past service over a 30-year period, investment losses, as well as current services.[34] Prior to ERISA, past service had never been required to be funded (other than interest thereon) unless the employer contractually agreed otherwise; ERISA requires such funding.

Thus, with the adoption of ERISA, the statutory framework governing retirement plans became significantly more pervasive. Because the costs to employers of adopting these new requirements were substantial, however, Congress delayed the effective date for the adoption of the changes relating to participation, vesting and funding for plans in existence on January 1, 1974, to the first plan year commencing *after* December 31, 1975.[35]

Nachman contends that the vested benefits which it agreed with the UAW to provide prior to ERISA, and was not required by law to provide, are to be governed by its collective bargaining agreement with the UAW since it was not required to change the nature of its contractual bargain until January 1, 1976, prior to which it terminated the Plan. Under Title IV the PBGC insures only "nonforfeitable" benefits under the terms of plans terminating after June, 1974, but the benefits provided under the Nachman Plan and collec-

[33] ERISA § 203(a), 29 U.S.C. § 1053(a) (1975); I.R.C. § 411(a)(2).

[34] ERISA § 402(b)(3), 29 U.S.C. § 1082(b)(3) (1975); I.R.C. § 412(b)(3).

[35] ERISA § 306(b), 29 U.S.C. § 1086(b) (1975). As this Court observed in *City of Los Angeles Dep. of Water* v. *Manhart*, 435 U.S. 702, 721, n. 40 (1978), ERISA "paid careful attention to the problem of retroactivity. It set a wide variety of effective dates for different provisions of the new law."

tive bargaining agreement are not "nonforfeitable" as that term is defined in ERISA; or were such benefits required to become "nonforfeitable" prior to January 1, 1976.

II

NACHMAN IS NOT LIABLE FOR CONTINUED FUNDING OF THE PLAN SINCE UNDER THE PLAIN AND UNAMBIGUOUS LANGUAGE OF ERISA THE BENEFITS AT ISSUE WERE NOT "NONFORFEITABLE" AS DEFINED IN ERISA.

As discussed above, ERISA requires the PBGC to guarantee, and employers to be liable for, only "nonforfeitable benefits . . . under the terms of a plan . . ." ERISA § 4022(a), 29 U.S.C. § 1322(a). The statutory definition of "nonforfeitable" is set forth in ERISA § 3(19), 29 U.S.C. § 1002(19), which provides that " 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant . . . to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan."

Under the plain meaning of this language, which should be applied absent any ambiguity,[36] the benefits contracted for and provided by the Nachman Plan were not "nonforfeitable" since they were expressly conditioned upon and limited to the sufficiency of assets at termination. Only if the Plan had been in existence on January 1, 1976 (the effective date of the minimum funding and vesting requirements of Titles I and II) would amendments have been required for the Nachman Plan to delete this condition[37] and provide truly nonforfeitable benefits.

Thus, the benefits at issue, or the claims thereto, were not "unconditional" or "legally enforceable against the plan."

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[36] *U.S.* v. *Public Utilities Commission of Cal.*, 345 U.S. 295 (1953); *Martin* v. *Hunter's Lessee*, 1 Wheat 304 (1816).

[37] Treas. Reg. § 1.411(a)-4, 26 C.F.R. § 1.411(a)-4 (1978).

Under the dictionary definition, "nonforfeitable" means not subject to loss or forfeiture; cannot lose the right to.[38] "Unconditional" is defined as "not limited in any way; not bound or restricted by conditions or qualifications."[39] "Enforce" means "to put or keep in force . . . to obtain (payment, obedience, etc.) by force or compulsion."[40]

The benefits at issue, or the claims thereto, clearly do not meet any of these definitions since both Nachman and its employees, acting through their collective bargaining agent, agreed that the benefits would be paid only to the oldest employees with seniority and only to the extent funded at termination, and that Nachman would not be liable for such payments beyond the required contributions made prior to termination. Thus, the benefits and the claims thereto were both forfeitable and conditional, and could not be enforced against the Plan.[41] Since the parties have conceded, and the lower courts have found, that Nachman complied fully with the Plan terms and made all required contributions prior to termination, and that the Plan was properly terminated prior to the effective date of the minimum funding and vesting requirements of Titles I and II, the claims to the benefits at issue were forfeited under the terms of the Plan.

Faced with this simple logic and the uncontested facts of this case, the PBGC and UAW have been forced to employ tortured reasoning to support their position that the benefits

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[38] Oxford English Dictionary 448 (unabr. ed. 1970).

[39] Webster's New International Dictionary of the English Language 2486 (unabr. 3d. ed., 1976).

[40] Random House Dictionary of the English Language 473 (unabr. ed. 1966).

[41] Indeed, the regulation promulgated under the 1954 Code provision as amended by Title II of ERISA, which requires a plan to provide nonforfeitable benefits after January 1, 1976, states that rights to benefits "which are conditioned upon a sufficiency of plan assets in the event of a termination are considered to be forfeitable because of such condition." Treas. Reg. § 1.411(a)-4, 26 C.F.R. § 1.411(a)-4 (1978).

were "nonforfeitable." First, they have contended that the PBGC's own definition of nonforfeitable, contained in 29 C.F.R. § 2605.6(a), should take precedence over the statutory definition in section 1002(19). Next, the PBGC and the UAW have contended that even under the statutory definition the benefits are nonforfeitable because the employees in question satisfied all of the employment and age conditions to receive benefits under the Plan. Finally, the respondents have sought refuge in the legislative history of ERISA to find support for their position. These arguments, all but the first of which were adopted by the court of appeals, are incorrect.

A

THE STATUTORY DEFINITION OF "NONFORFEITABLE" TAKES PRECEDENCE OVER THE PBGC'S DEFINITION.

The PBGC has chosen to provide its own definition of nonforfeitable benefits in its regulation, 29 C.F.R. § 2605.6(a), which states that "a benefit payable with respect to a participant is considered to be nonforfeitable, if on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required of him or her under the provisions of the plan to establish entitlement to the benefit . . ."[42] It is little wonder that the PBGC would prefer the application of its own definition, since it wholly ignores the statute's requirement that to be nonforfeitable, and thus insured by the PBGC, a benefit, and a claim to a benefit, must be "unconditional" and "legally enforceable against the plan."

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[42] Even under the PGBC's own definition, the benefits at issue are not nonforfeitable. According to the PBGC's definition, a benefit is nonforfeitable only if *payable* with respect to a participant. The benefits at issue are not payable under the terms of the Nachman Plan since the Plan provides benefits as follows: "Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund." Article V, § 3, of the Plan, App. 24.

Both the district court and the court of appeals, however, correctly rejected this position. Although the PBGC and the UAW have argued that the statutory definition contained in Title I should not apply to the obligations of the PBGC set forth in Title IV, the term "nonforfeitable" is used without distinction throughout ERISA. This term, the definition of which appears only in Title I, and by its terms applies to "this Title [I]," must mean the same thing in that Title as it does when used in Title II, both of which contain the same substantive provisions in dealing with the forfeiture of rights on early termination of employment.[43] Title IV, which establishes the PBGC, provides for termination insurance for nonforfeitable benefits as that term is used in Title I and II. The Title I definition, therefore, necessarily applies to the other Titles.[44]

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[43] Significantly, the court of appeals failed to recognize that Title I, which governs all employee benefit plans, and Title II, which governs tax-qualified plans, both contain the same requirement to provide nonforfeitable benefits in the same language. The court of appeals, in explaining the content of ERISA, stated:

> "Title I attacks the lack of adequate 'vesting' provisions in many plans . . . Title I establishes minimum vesting standards to ensure that after a certain length of service an employee's benefit rights would not be conditioned upon remaining in the service of his employer. Employers were required to amend the terms of their plans to reflect these minimum standards effective January 1, 1976 . . . To improve the fiscal soundness of these pension funds, Title II amends the Internal Revenue Code to require minimum funding." Appendix to Petition, p. 4.

In fact, Title II establishes the same minimum vesting standards as Title I. ERISA § 203; I.R.C. § 411. The definition of "nonforfeitable," therefore, must have the same meaning in Titles I and II.

[44] The PBGC, in its opinion letters, recognizes the need to carry over definitions from Title I to Title IV, although all such definitions, by their terms, apply only to Title I. Thus, the PBGC has incor-

(Footnote continued on following page)

This reasoning follows the general rule that, "[i]n the absence of express restriction it may be assumed that a term is used throughout a statute in the same sense in which it is first defined." *Pampaga Sugar Mills* v. *Trinidad*, 279 U.S. 211, 218 (1929). As both lower courts held in the instant case, "[a]n earlier specific definition may properly color a subsequent use of the same words without redefinition." (App. 82; Appendix to Petition p. 7, n. 6, quoting from *Kent Manufacturing Corp.* v. *Commission*, 288 F.2d 812, 815 (4th Cir. 1961).) It would be intolerable to have different definitions of the important concept of nonforfeitable benefits for one title of ERISA than for another.

Although the PBGC has contended that it is entitled to judicial deference with respect to its regulations, such defer-

[44] (Continued)

porated the Title I definitions of "participant" (ERISA § 3(7), 29 U.S.C. § 1002(7)) and "plan year" (ERISA § 3(39), 29 U.S.C. § 1002(39)) in its Opinion Letters 75-3 and 75-101, respectively, both of which letters deal with Title IV obligations. This treatment is consistent with the Congressional intent (discussed *infra* at pp. 29-31) to apply the Title I definition of "nonforfeitable" to Titles II and IV of ERISA, the provisions amending the 1954 Code and establishing termination insurance. In the House bill which led to ERISA, H.R. 2, the definitional section (including what is now Section 1002(19) defining "nonforfeitable") applied to the provisions contained in a single Title, governing *both* the minimum vesting requirements *and termination insurance*. H.R. 2, 93d Cong., 2d Sess. §§ 2-514 (1974). The definitional section began "For purposes of this Title. . . ." Thus, in H.R. 2, the definition of "nonforfeitable" applied to both minimum vesting provisions and to what benefits were to be insured. The Senate Bill, S. 1179 (S. 1179, 93rd Cong., 2d Sess. (1974)), the organization of which was adopted in the final version of ERISA, placed the minimum vesting provisions and the insurance provisions in *separate* Titles. Thus, the carry-over of the definitional section of H.R. 2 with its precatory language should be read in light of the obvious intent to apply the definitions to both Titles of ERISA containing the new requirement to provide nonforfeitable benefits (Titles I and II), and the Title establishing insurance of such benefits (Title IV), as ultimately enacted.

ence is inapplicable where the agency is attempting to construe a statute contrary to its terms and intent. *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974). "A regulation which . . . operates to create a rule out of harmony with the statute [administered by the agency] is a mere nullity." *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134 (1936). Moreover, since the definition of which benefits are nonforfeitable determines the scope of the PBGC's insurance coverage, the agency is entitled to little or no deference. "An agency may not finally decide the limits of its statutory power." *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946).

In addition, the PBGC definition, which takes into account only the conditions imposed on the employees and ignores the other conditions imposed on the receipt of benefits, was rejected by Congress in enacting ERISA. In an early version of ERISA (H.R. 2), the term "nonforfeitable benefit" was defined as a claim "which notwithstanding any conditions subsequent which could affect receipt of any benefit flowing from such rights, arises from the participant's service and is no longer contingent on continued service."[45] Congress' rejection of this language and enactment of the additional requirement that the benefit or claim to a benefit be "unconditional and . . . legally enforceable against the plan" demonstrates that the PBGC's definition, which so closely parallels the rejected language, should not be employed.

The statutory definition of "nonforfeitable" thus takes precedence over the PBGC's definition of that term.[46]

[45] Welfare and Pension Plan Legislation: Hearings Before the General Subcommittee on Labor of the Committee on Education and Labor on H.R. 2 and H.R. 462, 93rd Cong., 1st Sess., 3-4 (1973) (text of H.R. 2).

[46] The issue of the PBGC's lack of authority to redefine "nonforfeitable" by regulation, along with the impropriety of the agency's attempt to expand its jurisdiction, is addressed at length in the *amicus curiae* brief filed herein by Concord Control, Inc.

B

UNDER THE STATUTORY DEFINITION, THE BENEFITS AT ISSUE ARE NOT "NONFORFEITABLE."

The court of appeals, while holding that the statutory definition of section 1002(19), rather than the PBGC's version, governs what benefits are insured under Title IV, held that the benefits at issue were nonforfeitable. Although conceding that the district court's construction was "linguistically plausible" and that "[u]nder ordinary usage, it may seem illogical to conclude that the Nachman Plan provides employees with nonforfeitable benefits when a clause in the Plan expressly precludes recovery from the employer in the event the plan terminated with insufficient assets," the court of appeals, quoting from *Riley v. MEBA Pension Trust*, 570 F.2d 406, 408-409 (2d Cir. 1977), concluded that, "The lower court fell victim to the not uncommon error of reading technical pension language as if it were ordinary English speech." (Appendix to Petition p. 8.)

The court of appeals was wrong. Under either ordinary English or "technical pension language" the benefits at issue were forfeitable because the Plan provided for forfeiture upon the condition that the Plan had insufficient assets at termination, and because ERISA did not preclude such provisions until after the Plan was terminated.

As recognized in *Riley, supra*, 570 F.2d at 409, a claim to a benefit, which is subject to a condition subsequent, is a forfeitable claim. Such a condition "makes [the employee's] claim legally unenforceable against the Plan; it thus constitutes a forfeiture within the meaning of ERISA." Until pension plans were required to be amended to eliminate such conditions in 1976, benefits or claims subject to such conditions were not, by definition, nonforfeitable.

The court of appeals reasoned that the Nachman Plan benefits were "unconditional" since [a]ll conditions placed upon the *participants* such as age and length of service have

been met . . . . Satisfaction of the claims is dependent upon sufficient assets, but this should not be viewed as a condition on the claim." (Emphasis added; Appendix to Petition p. 9.) No peculiarities of "technical pension language" could lead to such an illogical result. Unconditional means unconditional: "not limited in any way; not bound or restricted by conditions or qualifications," such as sufficiency of plan assets upon termination.

Moreover, the court of appeals looked only to the conditions placed upon the participants, and expressly ignored the additional conditions on the benefits and claims to benefits contained in the Plan. Such a construction recognizes only a portion of the rights and obligations provided by the Plan. This is especially inappropriate where the Plan was the product of collective bargaining by parties of equal strength. As the district court noted (App. 84), both the participants and Nachman created the expectation that full payments of all benefits provided by the Plan was conditioned on the Plan's being in existence the full 30 years. To ignore this condition, as did the court of appeals, is both linguistically and factually incorrect.

The court of appeals also held that the requirement of section 1002(19) that the claim to a benefit be "legally enforceable against the plan" was satisfied in the instant case since,

> ". . . although the benefit claim is admittedly not legally enforceable against the employer under the terms of the plan, the statute requires only that the claim be enforceable against the *plan*. Nachman's employees' claims are enforceable against the plan, they simply may not be collectable." (Emphasis in original; Appendix to Petition pp. 8-9.)

This rationale is fallacious. A right or claim which cannot, by its own terms, be collected, cannot be enforceable. Especially in the instant case, as noted above, since a key condition imposed by the Plan—the sufficiency of assets at termination—had not been met. the claims to the unfunded benefits cannot

be enforced by a participant against either the Plan or Nachman. Enforceability is a term used in contract law; the ability of a participant to enforce the payment of benefits must be viewed in light of the contract into which Nachman and the UAW entered. Nachman and the UAW agreed that Nachman would make a contribution to the Plan each year of its collective bargaining agreement and benefits would be paid therefrom to the extent funded. ERISA did not require a change in the nature of the agreement until January 1, 1976, after the Plan was terminated. Until the nature of Nachman's promise was legally required to be changed the benefits at issue were not enforceable against either Nachman or the Plan.

The court of appeals' rationale also totally ignores that the Nachman Plan specifically provided that the benefits at issue could not be enforced against the *Plan*, as well as against the employer, in the event the Plan was terminated with insufficient assets. Article X of the Plan (App. 32-35, as amended, App. 52) governs Plan termination. Sections 1 and 2 of Article X give both the employer and the UAW the right to terminate the Plan, after expiration of the collective bargaining agreement, upon 90 days' written notice. Section 3 provides that:

> "In the event of termination of the Plan, the assets *then remaining* in the fund [after payment of expenses] . . . shall be allocated by the Board [of Administration of the Plan] on the basis of present actuarial values *to the extent that they shall be sufficient,* for the purposes of paying retirement benefits . . . in the following order of precedence. . . ." (Emphasis added.)

There follows a list of six categories of preferred benefits based on age and seniority. Section 3 then provides:

> "If, after having made provision in the above order of precedence for some but not all of the above categories, the assets then remaining in the Fund are not sufficient to provide completely for the benefits for Employees in the next category, such benefits shall be provided for each such Employee on a pro-rata basis."

Thus, the claims to the benefits which were insufficiently funded at the termination of the Nachman Plan were expressly

unenforceable against the Plan at termination, because the Plan itself was precluded from allocating the remaining funds except in the order of priority set forth in Article X, § 3. Nachman and its employees had agreed that, (1) only if the Plan had remained in effect for 30 years could the benefits at issue be fully funded, (2) either party could terminate the Plan prior to full funding, and (3) the rights to these benefits would be forfeited to the extent there were insufficient assets at termination. As a result, the participants had no "claim" to any benefits in excess of the assets remaining at Plan termination.

The benefits at issue in this case and the claims thereto, therefore, did not meet the requirements of section 1002(19)—they were not "nonforfeitable" and thus are not insurable by the PBGC. Since the Plan was lawfully terminated before the effective date of the minimum vesting and funding requirements of Titles I and II of ERISA and after some 15 years, rather than the 30 years required for full funding, a major condition placed on those benefits by the Plan had not been met. Accordingly, Nachman is not obligated to provide continued funding for these benefits.

Under the plain and unambiguous language of ERISA, Nachman is entitled to judgment, and the decision of the court of appeals should be reversed.

III

THE LEGISLATIVE HISTORY OF ERISA, IF NECESSARILY CONSULTED, REQUIRES REVERSAL OF THE RULING BELOW.

A

THE LEGISLATIVE HISTORY SHOULD NOT BE CONSULTED SINCE THE LANGUAGE OF ERISA IS CLEAR AND UNAMBIGUOUS.

The rationale of the court of appeals, that benefits provided before the effective date of Titles I and II of ERISA and conditioned upon sufficiency of assets are nonforfeit-

able, proceeds not from the literal boundaries of ERISA, but principally from a strained reading of the legislative history. The short answer to this argument, as this Court noted in considering the impact of the Age Discrimination in Employment Act of 1967 on a retirement plan, is that the legislative history is irrelevant where the statute is clear and unambiguous on its face. *United Air Lines* v. *McMann*, 434 U.S. 192, 199 (1977).

Congress attempted to secure precision and certainty in the judicial and administrative construction of ERISA by providing a glossary of terms used in the statute, including the term "nonforfeitable." Given the controlling definition supplied by the Congressional draftsmen, there is no need to look to the legislative history. Indeed, "there would be little use in such a glossary if we were free in despite of it to choose a meaning for ourselves." *Fox v. Standard Oil Co.*, 294 U.S. 87, 96 (1935). Accordingly, the heavy reliance by the court of appeals on the legislative history of ERISA is misplaced.

The conclusions which the court of appeals drew from the legislative history are also erroneous, as the discussion below will demonstrate.

B

THE COURT OF APPEALS ERRED IN RULING THAT CONGRESS INTENDED TO EQUATE THE TERMS "VESTED" AND "NONFORFEITABLE" PRIOR TO THE EFFECTIVE DATES OF ERISA SINCE THOSE TERMS HAD DIFFERENT MEANINGS PRIOR TO ERISA.

The court of appeals, in reviewing the legislative history, relied on a syllogism to support its decision: first, in debating the enactment of ERISA, Congress occasionally used the terms "nonforfeitable" and "vested" interchangeably; second, the benefits at issue were known as "vested" benefits prior to ERISA; thus, the court below reasoned, Congress intended the benefits at issue to be nonforfeitable.

The court was mistaken, because its reasoning ignored the fact that, prior to ERISA, "nonforfeitable" and "vested" were different concepts, and only after all provisions of ERISA became effective did those terms become identical. "Nonforfeitable," under the 1954 Code prior to its amendment by ERISA, applied only to fully funded, unconditionally payable benefits; "vested" benefits, on the other hand, could be subject to certain conditions, including the sufficiency of funding of the plan through its continued existence, and thus could be forfeited. ERISA, *for the first time,* required vested benefits to be nonforfeitable. The interchangeable use of these terms in the Congressional debate referred to the new, stricter requirements to provide truly nonforfeitable benefits imposed after all the effective dates of Titles I, II and IV.

As the court of appeals recognized, prior to ERISA a benefit could be "vested" even when the plan providing that benefit conditioned it on the sufficiency of plan assets at termination. (Appendix to Petition p. 12.) Moreover, although a vested benefit was not subject to forfeiture upon the employee's termination of service in the normal course of events, it could be forfeited due to discharge for cause, employment by a competitor or divulgence of trade secrets. Clearly, prior to ERISA a benefit which had vested was not required to be nonforfeitable since it could be forfeited due to certain conduct of the employee (e.g., employment with a competitor) or acts beyond the employee's control (e.g., early termination of a plan). A vested benefit meant only that an employee was able to terminate employment without necessarily losing such benefits merely because he terminated prior to normal retirement age.[47]

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[47] Rev. Rul. 69-421, 1969-2 C.B. 590; Rev. Rule 69-157, 1969-1 C.B. 115. The term "vest" never appeared in the 1954 Code until after the enactment of ERISA. As previously discussed (at p. 12-13), the concept of vesting was adopted by regulation to prevent discrimination in favor of highly placed employees, and did not apply to collectively bargained plans such as the Nachman Plan. .

The court of appeals neglected to examine the pre-ERISA meaning of "nonforfeitable" in determining the relationship between that term and "vested." If it had, the court would have discovered that nonforfeitable rights to benefits were limited to only those which were fully funded. A nonforfeitable benefit could never be conditional. The term "nonforfeitable" prior to ERISA was used in the 1954 Code only twice, not to promise a benefit, but to prevent tax-deductible contributions from reverting to an employer: Int. Rev. Code of 1954, ch. 1 § 401(a)(7), as amended by P.L. 87-792, § 2, 76 Stat. 809 (now I.R.C. § 411 (d)(3)) required that upon termination of a plan, "the rights of all employees to benefits accrued to the date of such termination or discontinuance *to the extent funded* . . . [be] nonforfeitable" (emphasis added); Int. Rev. Code of 1954, ch. 1, § 401(d)(2) required that plans for sole proprietorships and certain partnerships provide that "the employees' rights to or derived from *the contributions* under the plan [be] nonforfeitable *at the time the contributions are paid* to or under the plan." (Emphasis added.)

Similarly, the regulations promulgated under the 1954 Code applied "nonforfeitable" only to rights in contributions already made, and not to benefits which had not been fully funded. For example, "[a]n employee's beneficial interest *in the contribution is nonforfeitable . . . at the time the contribution is made* if there is no contingency under the plan which may cause the employee to lose his rights in the contribution." (Emphasis added.) Treas. Reg. § 1.402(b)-1(a)(2)(i), T.D. 6203, 1956-2 C.B. 245 (now Treas. Reg. § 1.402(b)-1(d)(2)(i)). Again, "nonforfeitable" applied only to a funded promise to pay benefits.

Accordingly, the benefits at issue provided by the Nachman Plan were, prior to the effective date of Titles I and II of ERISA, vested in a contractual sense, so that an employee with seniority who terminated employment before age 65 might receive benefit payments, but such vested benefits were not nonforfeitable since they were conditioned on full funding and were, in fact, not fully funded. Although the Congressional history shows the use of the word

"vested" interchangeably with the word "nonforfeitable," the former term could not, by definition, have been given its pre-ERISA meaning. Rather, it was being employed in the sense it would ultimately be used in ERISA—to mean a benefit which was, in all events, unconditional and enforceable (i.e., nonforfeitable).

It was this intent to *change* the meaning of "vested" which permeates the Congressional reports, not an intent to define the concept of nonforfeitability to mean anything less than a fully funded, unconditional benefit. The court of appeals erred in finding otherwise. The 1954 Code permitted Nachman and the UAW to establish a plan which provided that the benefits at issue would be paid only if sufficiently funded. Since the Plan complied with all statutory requirements, the terms of the Plan and the contract between Nachman and the UAW must govern whether the benefits at issue are payable. The benefits which the PBGC now seeks to insure were never contracted for, and thus Nachman cannot be held liable for their payment.

C

UNDER EACH BILL LEADING TO THE FINAL FORM OF ERISA, ONLY TRULY NONFORFEITABLE BENEFITS WERE TO BE GUARANTEED.

ERISA, as enacted, is an amalgamation of two bills—H.R. 2, as passed by the U. S. House of Representatives on February 28, 1974, and S. 1179 as reported to the U. S. Senate by the Committee on Finance on August 21, 1973. The court of appeals found that ERISA requires the guarantee of benefits which, under the terms of a plan, are forfeitable unless fully funded. Each bill prior to enactment of ERISA, however, proposed a structure for a private pension system whereby only truly nonforfeitable benefits, and not those conditioned upon funding or any other condition, would be insured.

Of the two bills, only H.R. 2 (as passed by the House) contained a definition of "nonforfeitable"—the same definition which appears in ERISA, in § 3(19) of each:

"Nonforfeitable, when used with respect to a pension benefit or right, means a claim obtained by a participant . . . to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the Plan. . . ."

This definition was applicable to Title I of H.R. 2, which, as distinguished from ERISA, contained both (1) the minimum vesting requirements (section 203) and (2) the provisions governing termination insurance by the PBGC (section 409). In the ultimate version of ERISA, the minimum vesting requirements were placed in Title I and the termination insurance was covered in a separate title, Title IV. The definitional section of H.R. 2 was enacted almost word for word in the final version of ERISA.

Thus, under H.R. 2, the same definition of "nonforfeitable" applied to the provisions governing which benefits were required to be provided as well as which benefits were to be insured. Clearly, only truly nonforfeitable benefits, and not benefits conditioned upon sufficient funding, were to be insured. Moreover, the benefits to be insured were, under section 409(b) of H.R. 2, only those which were "nonforfeitable . . . *according to the schedule in section 203 in effect for such plan on [the] termination date.*" (Emphasis added.)[48] Since the vesting schedules in section

[48] The legislative history indicates that the reason this language was changed in the final version of ERISA, was that Congress decided to guarantee all benefits promised under a plan, not only those required to be nonforfeitable under the vesting schedules in section 203 as ultimately enacted. H. Rep. 93-1280, 93d Cong., 2d Sess. 368 (1974), reprinted in 1974 U.S. Code Cong., & Ad. News 5038, 5147.

203 were identical to those in section 203 of ERISA (29 U.S.C. § 1053 (1975)), and since the benefits provided in the schedules were those unconditional benefits which plans such as Nachman's were not required to adopt until January 1, 1976, it is clear that the House draftsmen never intended to insure, or require employers to be responsible for, the benefits at issue prior to January 1, 1976.

Under S. 1179, the requirement to provide nonforfeitable benefits was delayed due to the administrative burden and increased costs of providing nonforfeitable benefits. A plan in existence on the date of enactment had to provide nonforfeitable benefits for the first plan year beginning on or after January 1, 1976. The insurance of benefits was delayed even further so that no benefits would be guaranteed under plans terminating before 1978. Section 422(b). The committee report accompanying S. 1179 explains the reason for the delay in insuring benefits: "Premium taxes are to be paid for a minimum of 3 years before any benefits are paid out to give the new insurance program time to accumulate funds with which to pay benefits." S. Rep. 93-383, 93d Cong. 1st Sess. 87 (1973), *reprinted in* 1974 U.S. Code Cong., & Ad. News 4890, 4898. Since the insurance provisions would not come into effect under S. 1179 until after a plan was required to provide nonforfeitable benefits, only truly nonforfeitable benefits, and not those conditioned upon sufficient funding, would be guaranteed.

Titles I and II of ERISA do not permit a benefit which is required to be nonforfeitable to be conditioned upon sufficient funding. Under neither bill culminating in ERISA would benefits conditioned upon sufficient funding be insured, yet the PBGC now improperly seeks to insure benefits so conditioned.

D

NACHMAN WAS NOT REQUIRED TO FUND THE PLAN IMMEDIATELY UPON TERMINATION, SINCE CONGRESS INTENDED TO DELAY THE EFFECTIVE DATE OF THE VESTING AND FUNDING PROVISIONS OF ERISA DUE TO THE GREAT EXPENSE TO BE IMPOSED ON EMPLOYERS WITH RESPECT TO EARLIER ESTABLISHED PLANS.

The PBGC, a government-owned insurer created by ERISA, guarantees the payment of nonforfeitable benefits upon plan termination and is financed, in part, by premiums asssesed against plan sponsors such as Nachman. To prevent employers from establishing new plans with unrealistic benefits, or increasing benefits under established plans in reliance on the insurance provisions of ERISA, ERISA grants the PBGC a limited right of subrogation against employers whose pension plans are inadequately funded at the time of termination. ERISA § 4062(b); 29 U.S.C. § 1362(b) (1975).[49]

As an insurer, the PBGC is to guarantee only what the plan itself is legally obligated to pay. The provisions of ERISA specifying those benefits which are insured by the PBGC provides:

> "the [PBGC] shall guarantee the payment of all nonforfeitable benefits . . . *under the terms of a plan.*" ERISA §4022(a); 29 U.S.C. §1322(a) (1975). (Emphasis added.)[50]

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[49] See S. Rep. 93-383, 93d Cong. 1st Sess. 87 (1973), *reprinted in* 1974 U.S. Code Cong. & Ad. News 4890, 4898, which articulates the concern that without such right of subrogation employers might be unrealistically generous in agreeing to substantial pension benefits.

[50] It should be noted that, contrary to the court of appeals' analysis, the PBGC is to insure the payment of "benefits" not "claims" to benefits.

As previously discussed, prior to 1976 the Nachman Plan was not required to delete its provisions which conditioned the benefits at issue on the sufficiency of assets at termination. Yet the court of appeals, agreeing with the PBGC, held that the termination program established by Title IV created liability outside the framework of a plan's terms. If, as Congress intended, the PBGC is merely an insurer of benefits "under the terms of a plan," it is impossible to justify the position that the PBGC insures, and Nachman must reimburse it, for benefits which were not forfeitable under the terms of the Plan.

The controversy results from the delay between the date of enactment of ERISA and the effective date of the vesting and funding provisions of ERISA. Congress delayed the date on which an employer must amend its plan to promise a nonforfeitable benefit, not subject to divestment, and undertake an obligation to fund past service liability. As the district court stated, Congress provided for that delay "[i]n order to allow for appropriate adjustments to those plans which were already in existence." App. 81. Evidence of congressional awareness of the substantial economic burdens that the new law would impose on employers in excess of already-existing obligations appears throughout the legislative history of ERISA.

> "In order to provide sufficient time for pension and profit-sharing plans to adjust to the new vesting and funding standards, to make provision for additional costs which may be experienced, and to permit negotiated agreements to transpire, the Committee has provided a . . . delayed effective date for compliance with the vesting and funding standards."
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> * * *
>
> "[T]he Committee recognize[d] that despite a 3-year delayed effective date for compliance with vesting standards, there still may be some plans which experience

a cost burden that would result in substantial economic injury to the interests of employers and employees. As to these plans, provision is made that if they can demonstrate 'substantial economic injury' as defined and intended by the Act, they may be eligible for an additional period not to exceed five (5) years within which to commence compliance." S. Rep. No. 93-127, 93d Cong., 1st Sess. 22 (1973) reprinted in 1974 U.S. Code Cong. Ad. News 4838, 4872.

In fact, the sponsors of all of the bills which culminated in ERISA recognized and permitted mitigation of the increased expenses of funding nonforfeitable benefits by providing a delayed effective date for such requirements for plans in existence on the date of enactment. Congress thus balanced the interests of those affected by ERISA and gave employers the opportunity to react to the new law.[31] Nachman's first opportunity so to react was upon expiration of its collective bargaining agreement and, since it was closing its plant, it decided to exercise the right to terminate the Plan for which it had bargained with the UAW. Congress clearly did not intend to delay requiring an employer in such a position to provide a nonforfeitable benefit due to the substantial burden to employers of compliance, and yet create instant liability on September 2, 1974, for deficiencies in a plan's assets resulting from the failure to fund in full all vested benefits—something neither Illinois law nor the 1954 Code and regulations had required and something Nachman had not agreed to do.

Although the court of appeals correctly noted that ERISA was intended to guarantee payment of expected benefits (Appendix to Petition pp. 25-26), it incorrectly concluded that the benefits at issue were "expected" since such benefits were never promised, and the Nachman Plan terminated prior to the time it would have been required to promise such benefits. As the district court concluded, Nachman's employees

[31] See *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 247, 249 (1978); *City of Los Angeles Dep. of Water v. Manhart*, 435 U.S. 702, 721 (1978), discussed *infra* at pp. 35-6, 39-40.

had no expectation of receiving unfunded benefits. (App. 84.) The benefits at issue were not promised under the terms of the Plan, but only as the Plan would have been affected by ERISA had it remained in existence past January 1, 1976.

Contrary to the implications of the court of appeals' opinion, Nachman's position recognizes the integrity of the insurance program established by Title IV, by making it clear from the beginning that the scope of the PBGC's authority is to insure only benefits which a plan is legally obligated to pay. The PBGC, in its verified statement of facts in the district court (App. 70-74), explains that of the 136 plans which terminated on or before December 31, 1975, and for which the PBGC has assumed liability, 58 contain no limitation-of-liability provisions such as those contained in the Nachman Plan. The sponsors of those plans promised a nonforfeitable benefit, and it is the benefit provided by those plans which the PBGC termination insurance program insures in plans which terminated prior to the effective date of Titles I and II. Only such plans promised a benefit which covered employees could reasonably have expected to receive despite early plan termination. Not until such benefits became mandatory for all plans in 1976 would the PBGC's guarantee of benefits become universal.

The court of appeals in the instant case barely noted the grace periods in ERISA recognized in *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978). In *Allied*, this Court found unconstitutional a Minnesota statute which imposed liability on employers who terminated pension plans for the payment of unfunded benefits to all employees who had worked at least ten years. The Minnesota statute's "severe disruption of contractual expectations" was compared by this Court to the provisions for "gradual applicability or grace periods" in ERISA. 438 U.S. at 247. Indeed, this Court noted that, "Funding and vesting requirements [under ERISA] were delayed for an additional year [beyond the four months after enactment]. 29 U.S.C. §§ 1086(b), 1061(b)(2)." 438 U.S. at

249, n. 23.[52] These sections of ERISA are the very same sections upon which Nachman relies, and which the court of appeals disregarded in the instant case.

Moreover, the only Circuit Court decision (other than this case) dealing with the definition of "nonforfeitable benefit" under ERISA held that a benefit which had vested by the time the employee terminated his employment was in fact forfeitable, under the definition of section 1002(19), because under the terms of the plan it was subject to a condition subsequent: the benefit would be forfeited if the employee competed with his former employer. After 1976, such a benefit would be required by law to be nonforfeitable. *Riley* v. *MEBA Pension Trust, supra,* 570 F.2d 406, 409 (2d Cir. 1977).[53] The court in *Riley* also emphasized the importance of the effective dates provided by ERISA, noting:

> "The careful attention paid by Congress in [ERISA] to the problem of effective dates makes us hestitate to conclude that the courts have long been authorized . . . to create obligations similar to ERISA.[54] *** [C]are must be taken not to subvert the intention of Congress to postpone the effective date of the vesting provisions in order to afford a fair opportunity to bring plans and their application in line with the new vesting requirements. (Emphasis added.)" 570 F.2d at 409. See also *Moore* v. *Home Ins. Co.*, No. 77-2045, Slip op. at 2783 (9th Cir., August 3, 1978).

Along with a number of district court decisions dealing with these issues,[55] these cases provide clear judicial recog-

[52] See also, *City of Los Angeles Dep. of Water v. Manhart*, 435 U.S. 702, 721, n. 40 (1978), discussed *infra* at 39-40, where the Court noted the prospective nature of ERISA and the effective date provided by § 1086(b).

[53] The court in *Riley* went on to hold that, although the benefit was forfeitable, the employee had not in fact breached the condition subsequent. 570 F.2d at 413.

[54] Quoting from *Lugo v. Employees Retirement Fund,* 529 F.2d 251, 255 (2d Cir.), *cert. denied,* 429 U.S. 826 (1976).

[55] *Fremont v. McGraw Edison Co.,* 460 F.Supp. 599, 601 (N.D. Ill. 1978); *A-T-O, Inc. v. PBGC,* 456 F.Supp. 545 (N.D. Ohio 1978); *Winpisinger v. Aurora Corp. of Ill.,* 456 F.Supp. 559 (N.D. Ohio 1978); *Schlansky v. United Merchants & Manufacturers, Inc.,* 443 F.Supp. 1054, 1063-64 (N.D. N.Y. 1977).

nition of the congressional intent to grant a grace period to 1976 during which plan sponsors such as Nachman were not subject to the new minimum vesting and funding requirements imposed by ERISA. The intent so to delay the effect of these provisions is evident both in the legislative history and from the face of the statute.

The position of the PBGC and the UAW would render this grace period meaningless and nonexistent since the benefits at issue would have become "nonforfeitable" immediately upon enactment on September 2, 1974, rather than in 1976.[56] The court of appeals' citation of legislative history ignores the concern specifically expressed by Congress that the new, substantial economic burdens of ERISA must be phased in to allow plan sponsors "time . . . to adjust to the new vesting and funding standards, to make provision for additional costs which may be experienced, and to permit negotiated agreements to transpire. . . ." S. Rep. No. 93-127, 93d Cong. 1st Sess. 36, (1973), *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4872.

In fact, the decision below would result in a retroactive application of ERISA. As the court of appeals concluded:

> "Title IV of ERISA does affect Nachman retroactively. . . . Although it is true that the statute applies only to prospective terminations, it also applies retrospectively to the invalidated exclusion of liability clauses in pension plans agreed upon prior to ERISA. Thus, to the extent that ERISA invalidates Nachman's otherwise valid acts which occurred prior to enactment, it is retroactive."

Although it acknowledged that the burden imposed on Nachman by retroactive application of ERISA "cannot be

[56] Further, the PBGC position would result in benefits being nonforfeitable for purposes of plan termination before the same benefits would become nonforfeitable for continuing plans. This result, however, is expressly precluded by ERISA § 4022(a), 29 U.S.C. § 1322(a), and by the PBGC's own regulation, 29 C.F.R. § 2605.6(a): . . . "benefits that become nonforfeitable solely as the result of the termination of a plan will be considered forfeitable."

characterized as insubstantial,"[57] the court of appeals justified that result by finding that the burden was "rationally related to the Congressional purpose." Appendix to Petition, p. 24.

Undoubtedly, as the court below noted, "Congress perceived a widespread problem of national importance" caused by early plan terminations. Appendix to Petition, p. 24. The court failed to consider, however, that Congress also perceived the substantial burden which would have been imposed on employers such as Nachman if the minimum vesting and funding requirements had become effective as to existing plans upon enactment in 1974. Yet, that is precisely the result imposed by the decision of the court of appeals.

The court of appeals' analysis rested upon the "mechanics of the insurance system established in Title IV," which took effect in 1974. Appendix to Petition, p. 4. Title IV, however, cannot be viewed in a vacuum. "[I]n interpreting separate provisions of a single Act [courts must] give the Act 'the most harmonious comprehensive meaning possible' in light of the legislative policy and purpose." *Weinberger* v. *Hynson, Wescott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1972). As previously discussed, although Congress provided that the PBGC's guarantee of benefit payments began in 1974, it expressly limited that guarantee to "the payment of all nonforfeitable benefits . . . under the terms of a plan." ERISA § 4022(a), 29 U.S.C. § 1322(a) (1975). Thus, when viewed in light of the delay until January 1, 1976 of the minimum vesting and funding requirements of Parts 2 and 3 of Title I, it is clear that Congress never intended to require the PBGC to insure, or employers to be responsible for, the benefits required to be provided after that date, unless the employer had previously committed itself to provide them.

[57] See Appendix to Petition, p. 24, n. 29.

Indeed, this Court has emphasized the care with which Congress approached the problem of retroactivity in ERISA. *City of Los Angeles Dep. of Water* v. *Manhart, supra,* 435 U.S. 702, 721, n. 40 (1978). In that case, this Court reversed the award of a refund of excess contributions to a pension fund found to have been required of female employees in violation of Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000(e)-2(a)(1)). The Court found that since "[d]rastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, . . ." could jeopardize the fund's solvency and ultimately the benefits provided, ". . . the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result." 435 U.S. at 721. The footnote which followed explained that Congress, in enacting ERISA, "underlined the importance of making only gradual and prospective changes in the rules that govern pension plans by prescribing the variety of effective dates previously discussed herein.

The court of appeals in the instant case, however, found that contrary to this Court's opinion of congressional intent, Congress in fact intended to impose retroactive liability on Nachman in order to fulfill the "reliance interests" of Nachman's employees in the benefits provided under the Plan. This fallacious reasoning ignores the fact that the benefits were not promised, but were conditioned upon sufficiency of assets upon termination, and that the Plan was the result of collective bargaining between Nachman and the UAW. It also ignores the express provision of the Plan (Article IX, Section 1(b), at pp. 31) which provided that the Plan could be amended to comply with changes in state or federal law, but that no such amendment would be permitted which "would, in any manner, change the amount of contributions to be made by [Nachman]."

Thus, the parties contemplated the possibility that the laws governing pension plans could be changed, but mutually agreed, for the benefit of each party, that the contributions to the Plan would neither be increased nor decreased. It is precisely such intentions which Congress refused to frustrate. As recognized by this Court in the *Allied* and *Manhart* cases, Congress sought to balance the interests of the employers and employees by imposing new, costly requirements for pension plans but allowing time to adjust to the new law.

The decision of the court of appeals runs contrary to this congressional intent, and should be reversed.

CONCLUSION

For the foregoing reasons, Nachman is entitled to judgment in this action declaring that Nachman is not liable for continued funding of the benefits provided in the Nachman Plan beyond the assets remaining in the Plan at termination. The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed, and the judgment of the United States District Court for the Northern District of Illinois should be affirmed.

Respectfully submitted,

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ADDENDUM

STATUTES INVOLVED

United States Code, Title 26

§401(a)(2) [prior to amendment by ERISA]

"(a) REQUIREMENTS FOR QUALIFICATION.—A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section— ***

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries; *** and"

§401(a)(4) [prior to amendment by ERISA]

"(4) if the contributions or benefits provided under the plan do not discriminate in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees."

§401(a)(7) [prior to amendment by ERISA]

"(7) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that, upon its termination or upon complete discontinuance of contributions under the plan, the rights of all employees to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the amounts credited to the employees' accounts are nonforfeitable."

§402(a)(1) and (2) [prior to amendment by ERISA]

"(a) TAXABILITY OF BENEFICIARY OF EXEMPT TRUST.—

(1) GENERAL RULE—Except as provided in *** the amount actually distributed or made available to

any distributee by any employees' trust*** shall be taxable to him, in the year in which so distributed or made available ***.

(2) CAPITAL GAINS TREATMENT FOR CERTAIN DISTRIBUTIONS.— *** if the total distributions payable with respect to any employee are paid to the distributee within 1 taxable year of the distributee on account of the employee's death or other separation from the service, or on account of the death of the employee after his separation from the service, the amount of such distribution, to the extent exceeding the amounts contributed by the employee *** shall be considered a gain from the sale or exchange of a capital asset held for more than 6 months. ***"

§404(a) [prior to amendment by ERISA]

"(a) GENERAL RULE.—If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued on account of any employee under a plan deferring the receipt of such compensation, *** they shall be deductible under this section, ***"

§410(a)(1)(A)(ii)

"A trust shall not constitute a qualified trust *** if the plan *** requires, as a condition of participation *** that an employee complete a period of service with the employer *** extending beyond *** the date on which he completes 1 year of service."

§411(a)(2)

"(2) EMPLOYER CONTRIBUTIONS.—A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).[*]

(A) 10-YEAR VESTING—A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

(B) 5 to 15-YEAR VESTING—A plan satisfies the requirements of this subparagraph if an employee who

has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table:

Years of Service	Nonforfeitable percentage
5	25
6	30
7	35
8	40
9	45
10	50
11	60
12	70
13	80
14	90
15 or more	100

(C) RULE OF 45.—

(i) A plan satisfies the requirements of this subparagraph if an employee who is not separated from the service, who has completed at least 5 years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table:

If years of service equal or exceed—	and sum of age and service equals or exceeds—	then the nonforfeitable percentage is—
5	45	50
6	47	60
7	49	70
8	51	80
9	53	90
10	55	100"

§412(b)(3)

"(3) CREDITS TO ACCOUNT.—For a plan year, the funding standard account shall be credited with the sum of—

(A) the amount considered contributed by the employer to or under the plan for the plan year,

(B) the amount necessary to amortize in equal annual installments (until fully amortized)—

(i) separately, with respect to each plan year, the net decrease (if any) in unfunded past service liability under the plan arising from plan amendments adopted in such year, over a period of 30 plan years (40 plan years in the case of a multiemployer plan),

(ii) separately, with respect to each plan year, the net experience gain (if any) under the plan, over a period of 15 plan years (20 plan years in the case of a multiemployer plan), and

(iii) separately, with respect to each plan year, the net experience gain (if any) resulting from changes in actuarial assumptions used under the plan, over a period of 30 plan years,

(C) the amount of the waived funding deficiency (within the meaning of subsection (d) (3)) for the plan year, and

(D) in the case of a plan year for which the accumulated funding deficiency is determined under the funding standard account if such plan year follows a plan year for which such deficiency was determined under the alternative minimum funding standard, the excess (if any) of any debit balance in the funding standard account (determined without regard to this subparagraph) over any debit balance in the alternative minimum funding standard account."

United States Code, Title 29

§1002(19)

"For purposes of this subchapter:

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable

against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title."

§1052(a) (1) (a) (ii)

No pension plan may require, as a condition of participation in the plan, that an employee complete a period of service with the employer *** extending beyond *** the date in which he completes 1 year of service.

§1053(a)

"(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraph *** (2) of this subsection.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

(A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table:

Years of service:	Nonforfeitable percentage
5	25
6	30
7	35
8	40
9	45

Years of Service:	Nonforfeitable percentage
10	50
11	60
12	70
13	80
14	90
15 or more	100.

(C)(i) A plan satisfies the requirements of this subparagraph if a participant who is not separated from the service, who has completed at least five years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table:

If years of service equal or exceed—	and sum of age and service equals or exceeds—	then the nonforfeitable percentage is—
5	45	50
6	47	60
7	49	70
8	51	80
9	53	90
10	55	100.

(ii) Notwithstanding clause (i), a plan shall not be treated as satisfying the requirements of this subparagraph unless any participant who has completed at least 10 years of service has a nonforfeitable right to not less than 50 percent of his accrued benefit derived from employer contributions and to not less than an additional 10 percent for each additional year of service thereafter.

§1061(b)(2)

"(2) Except as otherwise provided in subsections (c) and (d) of this section in the case of a plan in existence on January 1, 1974, this part shall apply in the case of plans years beginning after December 31, 1975."

§1082(b)(3)

"(3) For a plan year, the funding standard account shall be credited with the sum of—

(A) the amount considered contributed by the employer to or under the plan for the plan year,

(B) the amount necessary to amortize in equal annual installments (until fully amortized)—

(i) separately, with respect to each plan year, the net decrease (if any) in unfunded past service liability under the plan arising from plan amendments adopted in such year, over a period of 30 plan years (40 plan years in the case of a multiemployer plan),

(ii) separately, with respect to each plan year, the net experience gain (if any) under the plan, over a period of 15 plan years (20 plan years in the case of a multiemployer plan), and

(iii) separately, with respect to each plan year, the net gain (if any) resulting from changes in actuarial assumptions used under the plan, over a period of 30 plan years."

§1086(b)

"(b) Except as otherwise provided in subsections (c) and (d) of this section, in the case of a plan in existence on January 1, 1974, this part shall apply in the case of plan years beginning after December 31, 1975."

§1322(a)

"(a) Subject to the limitations contained in subsection (b) of this section, the corporation shall guarantee the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under the terms of a plan which terminates at a time when section 1321 of this title applies to it."

§1362(b)

"(b) Any employer to which this section applies shall be liable to the corporation in an amount equal to the lesser of—

(1) the excess of—

(A) the current value of the plan's benefits guaranteed under this subchapter on the date of termination over

(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

(2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

§1381(a)

(a) The provisions of this subchapter take effect on September 2, 1974.

(b) Notwithstanding the provisions of subsection (a) of this section, the corporation shall pay benefits guaranteed under this subchapter with respect to any plan—

(1) which is not a multiemployer plan,

(2) which terminates after June 30, 1974, and before September 2, 1974,

(3) to which section 1321 of this title would apply if that section were effective beginning on July 1, 1974, and

(4) with respect to which a notice is filed with the Secretary of Labor and received by him not later than 10 days after September 2, 1974, except that, for reasonable cause shown, such notice may be filed with the Secretary of Labor and received by him not later than October 31, 1974, stating that the plan is a plan described in paragraphs (1), (2), and (3).

The corporation shall not pay benefits guaranteed under this subchapter with respect to a plan described in the preceding sentence unless the corporation finds substantial evidence that the plan was terminated for a reasonable business purpose and not for the purpose of obtaining the payment of benefits by the corporation under this subchapter or for the purpose of avoiding the liability

which might be imposed under subtitle D if the plan terminated on or after September 2, 1974. The provisions of subtitle D do not apply in the case of such plan which terminates before September 2, 1974. For purposes of determining whether a plan is a plan described in paragraph (2), the provisions of section 1348 of this title shall not apply, but the corporation shall make the determination on the basis of the date on which benefits ceased to accrue or on any other reasonable basis consistent with the purposes of this subsection.

Regulations:

Treas. Reg. §1.411(a)-4, 26 CFR §1.411(a)-4 (1978):

(a) **Nonforfeitability.** Certain rights in an accrued benefit must be nonforfeitable to satisfy the requirements of section 411(a). This section defines the term "nonforfeitable" for purposes of these requirements. For purposes of section 411 and the regulations thereunder, a right to an accrued benefit is considered to be nonforfeitable at a particular time if, at that time and thereafter, it is an unconditional right. Except as provided by paragraph (b) of this section, a right which, at a particular time, is conditioned under the plan upon a subsequent event, subsequent performance, or subsequent forbearance which will cause the loss of such right is a forfeitable right at that time. Certain adjustments to plan benefits such as adjustments in excess of reasonable actuarial reductions, can result in rights being forfeitable. Rights which are conditioned upon a sufficiency of plan assets in the event of a termination or partial termination are considered to be forfeitable because of such condition. However, a plan does not violate the nonforfeitability requirements merely because in the event of a termination an employee does not have any recourse toward satisfaction of his nonforfeitable benefits from other than the plan assets or the Pension Benefit Guaranty Corporation.***

29 C.F.R. §2605.6(a) (1978):

For purposes of this part, a benefit payable with respect to a participant considered to be nonforfeitable, if on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required

of him or her under the provisions of the plan to establish entitlement to the benefit, except the submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit that returns all or a portion of a participant's accumulated mandatory employee contributions upon his or her death.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1557

NACHMAN CORPORATION,
Petitioner,
v.

PENSION BENEFIT GUARANTY CORPORATION

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT UAW

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BRIEF FOR RESPONDENT UAW

COUNTERSTATEMENT OF THE QUESTION PRESENTED

A defined benefit pension plan is terminated after the September 2, 1974, effective date of the guaranty pro-

visions of ERISA,[1] 29 U.S.C. § 1322, but before the January 1, 1976, effective date of the Act's minimum vesting rules, 29 U.S.C. § 1053. The retirement benefits are vested under the terms of the plan. However, the assets of the trust are insufficient to fund them fully. PBGC[2] guarantees the benefits, finding them "nonforfeitable" within 29 U.S.C. § 1322,[3] and asserts statutory liability against the employer under 29 U.S.C. § 1362.[4]

In such a termination, does the plan's disclaimer, purporting to exclude recourse to the employer's assets for satisfaction of vested rights, render those rights *not* "nonforfeitable" within 29 U.S.C. § 1322, and thus not subject to PBGC guaranty?

COUNTERSTATEMENT OF THE CASE

In 1960, by agreement with the UAW,[5] the Nachman Corporation established a pension plan for hourly employees at its facility in Chicago. The Plan promised a defined benefit, ranging from $1.60 to $3.50 *per* month *per* year of service, depending on the date of retirement, not to exceed a monthly *maximum* ranging from $48 to $105.[6]

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[1] Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1381 (1975), Pub. L. 93-406, of which the guaranty provisions are Title IV, 29 U.S.C. §§ 1301-1381, 88 Stat. 1003-1034. The relevant provsions are reproduced in the Addendum to Petitioner's Brief at 7-9, hereafter cited "Ad. 7-9."

[2] Pension Benefit Guaranty Corporation, existing within the Department of Labor. *See:* §§ 4002-4009 of ERISA, 29 U.S.C. §§ 1302-1309 (1975).

[3] § 4022 of ERISA, at Ad. 7.

[4] § 4062 of ERISA, at Ad. 7-8.

[5] Co-respondents, whose full name is in the caption, hereafter "UAW".

[6] The Plan, as amended, is reprinted in the Appendix at 13-52, hereafter cited "A. 13-52." The $1.60/mo./yr. rate, applied to retirements before November 2, 1964. The defined benefit ranged up to the $3.50/mo/yr. rate, promised those who retired after November 1, 1973. (A. 49-50)

As is typical of a defined benefit plan,[7] Nachman was required to make contributions to a trust fund on an actuarial basis.[8]

The Plan's structure reflects the normal divisions. Separate articles set out: the defined benefit promise;[9] what age and service is required for a vested right to

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[7] There are two basic types of pension programs: (1) "defined benefit"; and (2) "defined contribution" or "individual account" plans. This Court noted the difference in *Alabama Power Co.* v. *Davis,* 431 U.S. 581, 593 n. 18 (1977): "Petitioner's plan is a 'defined benefit' plan, under which the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits. The other basic type is a 'defined contribution' plan, under which the employer's contribution is fixed and the employee receives whatever levels of benefits the amount contributed on his behalf will provide." In "defined contribution" plans, the money is paid into an individual account for each employee, hence the name "individual account" plan. A defined contribution or individual account plan's liabilities cannot exceed its assets. There is, then, never any funding insufficiency for PBGC to insure. Defined contribution or individual account plans, accordingly, are excluded from Title IV's coverage. § 4021(b)(1) & (12), 29 U.S.C. § 1321(b)(1) & (12) (1975). In contrast, a defined benefit plan's actuarial liabilities ordinarily far exceed its assets, because of unfunded past service liability. *See:* note 8, *infra.*

[8] Art. IV § 2 of the Plan requires payment of normal cost, past service liability, and administrative expenses. (A. 22-3) "Normal cost" is the money which, according to the actuary, will fund the benefits due, on retirement, for work done in the current plan year. "Past service liability" arises only because when the pension plan started, employees were given credit for *all* years worked with the employer, not just years since the plan began. *E.g.,* suppose a plan starts in 1960, but allows any 65 year old employee with 10 years of service to retire in 1961. Only one year (1960) will be paid by 1961. If an individual has 30 years of service, and retires in 1961, then 29 years of "past service" remain to be funded. This "past service liability" is funded by amortizing the principal, plus interest, over a 30-year funding cycle. A yearly contribution to this amortization is required, in addition to normal cost, if the plan is to pay benefits when due.

[9] Article II, as amended (A. 14-17, 38-52).

those benefits;[10] establishment of a trust fund and bank trustee;[11] actuarial funding;[12] and various administrative matters.[13]

The labor agreement expired October 31, 1975. Nachman then decided to close the plan. On December 31, 1975, Nachman unilaterally terminated the Plan.[14]

The assets in the trust fund are insufficient to pay all the vested rights which accrued before the termination. Those assets can provide only 35% of the accrued vested benefits.[15] If not subject to the PBGC guaranty, the benefits of the 135 retirees will be reduced ratably—from an average of $77 a month to $27 a month.[16]

There is no dispute that the pension rights here are vested under the terms of the Plan.[17] PBGC determined that, as such, they are "nonforfeitable" within § 4022 of ERISA, 29 U.S.C. § 1322, and so subject to guaranty.[18]

[10] Article VII (A. 28): for normal retirement benefits, age 65 and 10 years of service; for early retirement benefits, age 60 and 10 years of service; for disability retirement benefits, a finding of disability and 15 years of service; and for deferred vested retirement benefits, termination after age 45, but before 60, with 15 years of service. Article VIII governs the mechanics of payment. (A. 29-31)

[11] Article V (A. 24-25).

[12] Article IV (A. 22-23).

[13] Article III, administration (A. 18-22); Article I, establishment (A. 13-14); Article IX, amendment (A. 31-32); Article X, termination (A. 32-35); and Article XI, miscellaneous (A. 35-37).

[14] Complaint, ¶ 10 (A. 5).

[15] Affidavit of Robert Kryvicky (A. 75).

[16] 592 F.2d at 961 n. 29, *reprinted in* the Appendix to the Petition at 24, *relying on* Affidavit of Robert Kryvicky (A. 75).

[17] 592 F.2d at 952, *reprinted in* Appendix to Petition at 5-6. *See:* Nachman's Brief at 15, 27-29.

[18] Complaint ¶ 19 (A. 8).

Nachman sued for a declaration that the benefits cannot be guaranteed under Title IV,[19] and to enjoin PBGC's assertion of 4062 liability.[20] Although it terminated the Plan well after the September 2, 1974, effective date of Title VI,[21] Nachman argued that the language of the Plan foreclosed the statutory guaranty. Article V § 3, dealing with the trust fund, provided:

> The Fund shall be utilized for the payment of benefits provided herein and for payment of the Trustee's fees, expenses of administration, and fees and expenses . . . to the extent not paid directly by the Company. Benefits provided for herein shall be only such benefits as can be provided by the assets of the fund. In the event of termination of this Plan, there shall be no liability or obligation on the part of the Company to make any further contributions to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid. [Article V § 3 (A. 24)]

Nachman claimed, that prior to the January 1, 1976, effective date of the minimum vesting rules, 29 U.S.C. § 1053,[22] clauses like Article V § 3 could operate to make benefits conditional on adequate funding, and thus, *not* "nonforfeitable". On Nachman's view, after that date, the minimum vesting rules would void such clauses. The UAW intervened.

On cross-motions for summary judgment, the District Court adopted Nachman's reading, holding that Congress did not intend, until January 1, 1976, to subject employers, through § 4062, to liability for unfunded benefits

[19] *Id.* The statutory provisions are *reprinted at* Ad. 7-8.

[20] Complaint, prayer (A. 1-9, at 9).

[21] § 4082(a) of ERISA, 29 U.S.C. § 1381(a), Ad. 8.

[22] § 203 of ERISA, at Ad. 5-6.

which they had disclaimed.[23] The District Court did not reach the constitutional issue.

The Seventh Circuit reversed.[24] Applying Title I's definition of "nonforfeitable", found in § 3(19),[25] to Title IV, the Court below held that, in light of the legislative history, vested pension rights satisfied that definition, without regard to the adequacy of funding. The claims were unconditional and enforceable *against the plan,* precisely as § 3(19) requires. The *claims* are *unconditional and enforceable* even though, for lack of funding, they may not be *collectable.* As the disclaimer deals with recourse against the employer, rather than the plan itself, it is irrelevant. Congress plainly intended to guaranty benefits on September 2, 1974. "[T]he purpose of Title IV was to guarantee benefits that might be lost because of employer liability disclaimers." 592 F.2d at 956, Appendix to Petition at 11. The Circuit Court held the vested rights subject to PBGC's guaranty, and Nachman, as a result, subject to § 4062 liability. It also held that Title IV satisfies the Due Process Clause of the Fifth Amendment.

The Court granted *certiorari,* limited to the statutory issue. —— U.S. —— (June 18, 1979), 99 S. Ct. 2881, 61 L. Ed 2d 310.

[23] 436 F. Supp. 1334 (N.D. Ill. 1977) (*per* Marovitz, J.) (A. 76-85).

[24] 592 F.2d 947 (7th Cir. 1979) (*per* Sprecher, J., *with* Cummings & Wisdom, J.J.), *reprinted in* the Appendix to the Petition at 1-29.

[25] § 3(19) of ERISA, 29 U.S.C. § 1002(19): "The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." (Ad. 4-5)

SUMMARY OF ARGUMENT

Congress intended to guarantee vested rights on September 2, 1974. The language and legislative history of Title IV demonstrate that the termination insurance program was intended to take effect *immediately* in order to meet an urgent need. Congress did not intend to allow employers 16 months in which to terminate these plans and exacerbate the problem.

There are two analytic routes to the "true" meaning of "nonforfeitable". Under either, these vested rights are guaranteed.

(i) Title IV is silent as to the meaning of the term "nonforfeitable", as Congress intended. PBGC properly filled the statutory interstice with a reasonable regulation that comports with the purposes of Title IV.

(ii) This regulation, and the resulting guaranty, are consistent, as well, with the definition of "nonforfeitable" contained in § 3(19) of Title I. As the Seventh Circuit held, the pension rights here satisfy this definition. The *claims* are unconditional and are enforceable *against the plan,* precisely as § 3(19) requires. The liability disclaimer in Article V § 3 is irrelevant.

Thus, whatever analytic route is followed, the pension rights here are "nonforfeitable", and guaranteed under § 4022.

The legislative history demonstrates that Title IV was designed to guarantee "vested" rights which would otherwise be lost due to liability disclaimers. Title IV repeatedly was said to guarantee "vested" rights. The committee reports and debates demonstrate an intent to remedy the problem of benefit loss resulting from disclaimers, when plans terminated without sufficient assets.

Congress did *not* intend to tie termination insurance coverage to the minimum vesting standards in Title I. Indeed, it recognized that these Titles were directed towards *distinct* problems.

There was no intent to delay the cost impact of Title IV. Instead, Congress moderated the potential liability of employers under § 4062.

Congress enacted § 4062 to deter solvent employers from needlessly terminating their plans, and from shifting the liability for continued funding to Title IV. Imposition of § 4062 liability on Nachman furthers this purpose, since it could have "frozen" the Plan instead of terminating it.

Nachman's argument that "nonforfeitable" must be construed to mean absolutely unconditional, without regard to funding, leads to indefensible conclusions. It renders Title IV superfluous after January 1, 1976. If disclaimers are invalidated once the minimum vested standards take effect, participants may bring suit, using § 203, anytime their rights are not fully possessory. The moderating compromises, limiting § 4062 liability, will be swept away.

Nachman's logic also conflicts with the language of Title IV, and trivializes the reporting requirements of Title I itself.

* * * *

ARGUMENT

The Court is asked to decide a question of legislative intent. Did Congress intend to guaranty vested rights in defined benefit pension plans on the September 2, 1974, effective date of Title IV, regardless of liability disclaimers? Or did it, as Nachman urges, intend to delay that protection, with minor exceptions, until the January 1, 1976, effective date of the minimum vesting rules of Title I? In human terms, the stakes are significant.[26]

Congress made no secret of the purpose of Title IV—protection of anticipated pension rights against loss because of termination before requisite funds had accumulated.[27] It made Title IV effective on September 2, 1974.[28] It said nothing about a 16 month delay. On the contrary, the benefit guarantees were made *retroactively effective*, for

[26] The first 16 months of PBGC's program are premised largely on the legal positions at issue here. During that period, PBGC provided (and continues to provide) pension guarantees to 20,995 individuals, amounting to some $52,785,000 in benefits. Even on conservative assumptions, 12,105 of those individuals, and some $32,986,000 of those benefits, arose in plans whose liability disclaimers matched Nachman's. *See:* Affidavit of Joseph E. Ellinger (A. 73-4). As the Seventh Circuit notes, the record does not reveal whether the other plans used various forms of *indirect* disclaimer. 592 F.2d at 956 n.14 (Appendix to Petition at 15). Such indirect disclaimers are not unusual, even after 1976, *see, e.g.*, the Westinghouse Pension Plan (1976-79), *reprinted in* B.N.A., COLLECTIVE BARGAINING NEGOTIATIONS & CONTRACTS, § 48, at 618, 622 (1977).

[27] § 2(a) of ERISA, 29 U.S.C. § 1001(a), contains Congress's findings and declaration: "The Congress finds . . . that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; . . . that they have become an important factor affecting the stability of employment and the successful development of industrial relations; . . . that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits . . . owing to the termination of plans before requisite funds have been accumulated. . . ."

[28] § 4082(a) of ERISA, 29 U.S.C. § 1381(a), at Ad. 8.

a two month "window". During this period PBGC was liable for guarantees, but was barred from asserting § 4062 liability against employers.[29] It would gainsay common sense for Congress to pass such a program, yet allow 16 months to terminate plans, free from guaranty or liability. That would only exacerbate the problem.

Nachman reaches its conclusion by fastening on the word "unconditional" in § 3(19),[30] the Title I definition of "nonforfeitable". To be guaranteed under § 4022, 29 U.S.C. § 1322, a claim must be nonforfeitable. But, to be *truly* nonforfeitable, Nachman tells us, the claim must be *truly* unconditional. Article V § 3 conditions the claim on funding, says Nachman, so these vested rights are *not* nonforfeitable, and *not* subject to guaranty. This will all change in 1976 when, it is argued, the minimum vesting rules of § 203, 29 U.S.C. § 1053, will require all claims to be *truly* unconditional.

Such a narrow and hostile reading does not comport with Congress's remedial intent. It limits Title IV, in the pre-1976 period, to a minuscule class of cases. For there to be a guaranty, the plan must allow recourse directly to the employer's (as distinct from the plan's) assets, *and* the employer must be insolvent. If no such recourse is allowed, although the employer is solvent, there can be no guaranty, says Nachman. If recourse is allowed, and the employer is solvent, there is no need for a guaranty. And, if no recourse is allowed, and the employer is insolvent, the retirees are doubly damned. Neither the language, nor the legislative history of Title IV, as we will see, supports such a hostile construction. Nachman's version of the definition of "nonforfeitable", if applied to

[29] § 4062, 29 U.S.C. § 1362, like most of Title IV, is not effective until September 2, 1974. *id.* The "window" is provided by § 4082 (b)(2) of ERISA, 29 U.S.C. § 1381(b). It ran from July 1, 1974, to September 2, 1974.

[30] *Reprinted at* note 25, *supra.*

the post-1976 world, necessarily opens some disturbing, not to say dangerous, doors.[31]

I

Meaning of "Nonforfeitable"

All agree that the meaning of "nonforfeitable" should be consistent, or at least consonant, throughout ERISA. The debate is about which of the competing versions, PBGC's or Nachman's, fulfills the legislative intent. There are two possible analytical routes to the "true" version. Title IV lacks a definition of "nonforfeitable". Either Congress intended this silence, so PBGC's regulation, 29 C.F.R. § 2605.6(a),[32] correctly fills the statutory interstice. Or the definition is misplaced, only to be found in Title I's § 3(19), so a construction of § 3(19) is required. The Seventh Circuit chose the second route.[33] By *either* analytical route, the vested rights here are "nonforfeitable".

A. *Title IV Has No Definition of "Nonforfeitable". PBGC Correctly Supplied One.*

Title IV does not contain its own definition of "nonforfeitable". The only definition of the term in ERISA is in § 3(19), 29 U.S.C. § 1002(19),[34] which is explicitly limited to Title I.[35]

[31] *See generally:* Brief of General Motors Corporation, *amicus curiae,* in support of PBGC and UAW.

[32] ". . . [A] benefit payable with respect to a participant is considered to be nonforfeitable, if on the date of termination of the plan the participant has satisfied all of the conditions required of him under the provisions of the plan to establish entitlement to the benefit, except the submission of a formal application, retirement, or the completion of a required waiting period." 29 C.F.R. § 2605.6(a)

[33] 592 F.2d at 952-3, *incl.* n. 6, *reprinted in* Appendix to Petition at 7.

[34] *Reprinted at* note 25, *supra.*

[35] § 3 of ERISA, 29 U.S.C. § 1002: "For purposes of this subchapter [*i.e.*, 29 U.S.C. §§ 1001-1144] . . ."

Title IV contains its own set of definitions.[36] Some definitions are new, and unique to Title IV.[37] Others are expressly borrowed from Titles I and II.[38] Congress, then, was quite able to supply or borrow definitions for Title IV. The silence as to "nonforfeitable" was intended,[39] or, at least, must be presumed so.

[36] § 4001 of ERISA, 29 U.S.C. § 1301.

[37] *See:* § 4001(a)(2), defining "substantial employer"; § 4001(a)(4), defining "corporation"; § 4001(a)(5), defining "fund"; § 4001(a)(6), defining "basic benefits"; and § 4001(a)(7), defining "non-basic benefit". 29 U.S.C. § 1301(a)(2), (4), (5), (6), (7).

[38] Title IV's definition of "administrator", § 4001(a)(1), 29 U.S.C. § 1301(a)(1), is from Title I's § 3(16), 29 U.S.C. § 1002(16). Title IV's definition of "multiemployer plan", § 4001(a)(3), 29 U.S.C. § 1301(a)(3), borrows 26 U.S.C. § 414(f) from Title II's amendments to the I.R.C.

[39] In the House bill, the definition of "nonforfeitable", the provisions dealing with minimum vesting standards, and those dealing with termination insurance were all contained in (what was to become) Title I. The definition of "nonforfeitable", in that bill, applied to the termination insurance provisions, as well as the minimum vesting standards. This was appropriate, since the House bill tied the termination insurance coverage to rights vested under the bill's minimum vesting standards. H.R. 2, *as amended*, 93d Cong., 2d Sess., at 1-3, § 409(b) (1974), III LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 at 3898-3900, 4024 (G.P.O. ed. 1976), hereafter cited "LEG. HIST.". In contrast, in the Senate bill the termination insurance provisions were contained in Title IV, and the minimum vesting standards were in Title I. There was no "definitions" section in Title I. This separation of the termination insurance provisions and the minimum vesting standards reflected the fact that the Senate bill provided for termination insurance coverage of benefits vested under the plan. H.R. 2, *as amended*, 93d Cong., 2d Sess., at 354-7, § 422(a) (1974), III LEG. HIST. at 3601-3604, 3702. The Conference Committee adopted the termination insurance provisions of the Senate bill. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 1-5, 225, 251-3, 368 (1974), III LEG. HIST. at 4277-81, 4495, 4519-21, 4635. Since it was not appropriate to make these provisions depend on a definition of "nonforfeitable" designed primarily for the House bill's minimum vesting standards, the Committee adopted the structure of the Senate bill. It placed the termination insurance provisions in Title IV, and the definition and vesting provisions in Title I. The definitions of Title I were, by their terms, limited to Title I.

The fair inference is that Congress meant for the agency charged with administering such a complicated program to fill the interstice by regulation. This is exactly what PBGC did, adopting a regulation, 29 C.F.R. § 2605.6(a), under which these benefits are plainly guaranteed.

Congress's grant of authority to PBGC is very broad.[40] It went so far as to give PBGC discretion, under Title IV, to extend its guaranty to non-basic benefits, and to cover certain multiemployer plans.[41] If exercised, that discretion could involve billions of dollars.[42] Its existence, whether or not exercised, demonstrates a legislative ease as regards PBGC, especially where the scope of its coverage is concerned.

[40] § 4002(b)(3), 29 U.S.C. § 1302(b)(3): ". . . [T]he corporation has the power—. . . (3) to adopt, amend, and repeal, by the board of directors, bylaws, rules, and regulations relating to the conduct of its business and the exercise of all other rights and powers granted to it by this Act . . ."

[41] Coverage is ordinarily limited to basic benefits. Non-basic benefits, *e.g.*, certain supplements, lump sums, health insurances, *etc.*, are not guaranteed. Yet § 4022(c), 29 U.S.C. § 1322(c), authorizes the PBGC ". . . to guarantee the payment of such other [*i.e.*, non-basic] classes of benefits and to establish the terms and conditions under which such other classes of benefits are guaranteed as it determines to be appropriate." To date, PBGC has not used this provision. 29 C.F.R. §§ 2609.1-2609.8 (1977). Multiemployer plans can be covered, at PBGC's discretion, on a case-by-case basis. § 4082(c)(2)-(4), 29 U.S.C. § 1381(c)(2)-(4).

[42] *E.g.*, a recent study indicates that 10% of multiemployer plans will face financial hardships which, in the next ten years, raise the possibility of termination. These plans cover about 1.3 million participants. They have, in the aggregate, about $8.3 billion in gross unfunded liability for guaranteeable benefits. That figure, less assets, leaves a net exposure of some $4.8 billion to PBGC, if the plans were covered. Understandably, PBGC has not seen fit to exercise this discretion, except in a couple of instances. It nonetheless exists. PBGC, MULTIEMPLOYER STUDY REQUIRED BY P.L. 95-214, at 15-16 (1978).

Deference to the PBGC here comports with "the venerable principle that the construction of the statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *E. I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 55 (1977), *quoting Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969). This is particularly so while the statutory parts are "yet untried and new". *Power Reactor Development Co.* v. *I.U.E.*, 367 U.S. 396, 408 (1961).

B. *The Court Below Properly Parsed* § *3(19).*

Under the alternative analysis, followed by the Seventh Circuit, a parsing of Title I's § 3(19) is required. It leads to the same conclusion.

Exceptions to remedial legislation are always narrowly construed. *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945). Congress proceeded on this assumption.[43]

The Seventh Circuit's construction, set out in the margin,[44] is correct. Section 3(19), 29 U.S.C. § 1002(19), provides:

[43] In the early discussions, we find: "It is intended that coverage under the Act be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs. Conversely, exceptions should be confined to their narrow purpose." S. Rep. 93-127, 93d Cong., 1st Sess., at 18 (1973), I LEG. HIST. at 604.

[44] 592 F. 2d at 953-4: "This construction, like the district court's also derives from the three elements required for nonforfeitability under the Section 1002(19) definition: the 'claim' to the benefits must 'arise from the participant's service,' it must be 'unconditional' and it must be 'legally enforceable against the *Plan*.' (Emphasis added) The benefit claims in issue can be seen to satisfy all three elements. The claims arise from participant service. Second, although the benefit claim is admittedly not legally enforceable against the employer under the terms of the plan, the statute requires only that the claim be enforceable against the *plan*. Nachman's employees' claims are enforceable against the plan, they simply may not be collectable. Nor is their claim against the plan

[Footnote continued]

> The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan.

The definition refers to "a *claim* obtained by a participant . . . to [a] benefit . . . , which is unconditional, and which is legally enforceable against the plan." (italics supplied) The last two reflexive clauses—"which is unconditional" and "which is legally enforceable against the plan"—reflect on the word "claim", not on the word "benefit". There is a comma before each clause, separating it from "benefit", and making each clause parallel to the "obtained by . . ." clause. The "obtained by . . ." clause modifies the word "claim", as must any parallel clause.

The question, then, is whether the *claim* is unconditional and enforceable against the plan, *not* whether the benefit is so. The *claims* here clearly meet this test. In a defined benefit plan, like the instant Plan, the basic

conditional. All conditions placed upon the participant such as age and length of service have been met. The PBGC definition interprets 'unconditional' only as referring to those conditions placed on the participant and not to sufficiency of assets. Satisfaction of the claim is dependent upon sufficient assets, but this should not be viewed as a condition on the claim. Under the pre-ERISA terminology, one author clarified that although benefit claims in fact were conditioned on the availability of funds in the trust, they were not to be considered conditional rights. . . . [quotation omitted] . . . D. McGill, PRESERVATION OF PENSION BENEFIT RIGHTS, 6 (1972). *See also:* Departments of Treasury and Labor, STUDY OF PENSION PLAN TERMINATIONS . . . 19 (1973). In sum, the definition instructs that nonforfeitability must be measured by the quantum of rights against the Plan and without regard to rights against the employer. The liability exclusion clause is therefore irrelevant to a determination of nonforfeitability because it relates only to a claim the employee may have had against an entity other than the Plan itself." [Appendix to Petition at 8-9, footnote omitted]

promise is to supply a stated benefit to participants.[45] Since these employees have satisfied all of the requirements for eligibility placed on them by Article VII,[46] their pension claims are unconditional. The liability disclaimer contained in Article V § 3, and other clauses of its type, were designed in the pre-ERISA world to defeat possession of the expected benefit in the event of fund insufficiency on termination. But this clause does not *divest* the participants of any rights, or make their rights unenforceable against the Plan. It simply defeats *possession* of their vested rights, in the event of fund insufficiency.

There is a great difference between a vested right or claim to something, and the possession of it. A vested right simply determines who, among the contenders, has the best claim. It certainly does not guarantee possession, as any judgment creditor who has tried to execute on an insolvent debtor well knows. Nor does it guarantee that, when and if possession occurs, the vested right will have a particular value. Any number of things, including inadequate funds in the hands of the debtor, can defeat possession or diminish value *without* divesting the right.

There is also a difference between enforcement of pension rights, and possession of those rights. A vested participant would be entitled to a judgment declaring his right, as against any non-vested participant, to the defined benefit promised by a plan. Perhaps, because of fund insufficiency, he could not collect. But that does not alter the legal enforceability of his claim, any more than a *nulla bona* return on a writ of execution alters that of a judgment creditor. In either case, the law will enforce, but there is simply nothing to enforce against.

In applying § 3(19) to § 4022, there is an obvious need to read the definition flexibly enough to distinguish between claims and possession. Section 4022 is, after all, addressed to participants who have claims which must

[45] *See:* note 6, *supra.*

[46] *See:* note 10, *supra.*

be guaranteed *because* the plan's assets are inadequate to make them possessory. As we shall see, Congress used "vested" and "nonforfeitable" interchangeably. It intended to guaranty these rights *immediately* under Title IV, *despite* liability disclaimers.[47]

Contrary to Nachman's assertion,[48] this parsing of § 3(19) is supported by the legislative evolution of the definition. Although the statutory language varied, the intent did not.[49]

[47] Part II, *infra.* Nachman's Brief, at 17 n. 41, and the Brief for Concord Control, Inc., *amicus curiae,* at 15, rely on Treasury Regulation, § 1.411(a)-4(a), to suggest otherwise. 26 C.F.R. § 1.411(a)-4(a), provides, in relevant part: "Rights which are conditioned upon a sufficiency of plan assets in the event of a termination or partial termination are considered to be forfeitable because of such condition. However, *a plan does not violate the nonforfeitability requirements merely because in the event of a termination an employee does not have any recourse toward satisfaction of his nonforfeitable benefits from other than the plan assets* or the Pension Benefit Guaranty Corporation." (italics supplied) The second sentence (italicized) provides, as PBGC urges here, that a plan qualifies under the Code even though, on termination, the only recourse is to plan assets and the PBGC. The preceeding sentence, if it is to be saved from contradiction, addresses a different problem—attempts to shed liability for vested benefits, by partial (or total) termination, without an allocation of existing plan assets. *E.g.,* in *Winpisinger* v. *Aurora Corp.,* 456 F. Supp. 559 (N.D. Oh. 1978) the trustees of the I.A.M.'s multiemployer plan adopted an amendment which retroactively eliminated vested rights for non-I.A.M. participants. The trustees tried to achieve financial advantage by elimination of these liabilities, which were no longer matched by contributions. Under the first quoted sentence of 26 C.F.R. §1.411(a)-4(a), such an amendment is a disqualifying partial termination, as it conditions rights on the sufficiency of assets.

[48] Nachman's Brief at 21.

[49] The bill originally introduced in the House, H.R. 2, defined "nonforfeitable pension benefit" as "a legal *claim* obtained by a participant or his beneficiary to that part of an immediate or deferred pension benefit, *which notwithstanding any conditions subsequent which could affect receipt of any benefit flowing from such right, arises from the participant's service and is no longer contingent on continued service.*" (emphasis supplied) H.R. 2, 93d Cong., 1st Sess., § 3(20) (1973), I LEG. HIST. at 12. The com-

[Footnote continued]

II

Congress Intended to Guaranty Vested Rights on September 2, 1974.

A. *To Meet an Urgent Need, Congress Made Title IV Effective Immediately.*

Congress made Title IV effective immediately, and, if required, retroactively, in order to meet an urgent need.

panion bill, H.R. 462, contained a similar definition of "nonforfeitable right or vested right". H.R. 462, 93d Cong., 1st Sess., § 3(26) (1973), I LEG. HIST. at 75. The bill originally introduced in the Senate, S. 4, contained parallel definitions. S. 4, 93d Cong., 1st Sess., § 3(26) & § 502(a)(20) (1973), I LEG. HIST. at 103, 148.

The version of S. 4 which was reported by the Senate Committee on Labor & Public Welfare contained these same definitions. S. 4, *as amended,* 93d Cong., 1st Sess., § 3(26) & § 502(20) (1973), I LEG. HIST. at 494-5, 543. The substitute for S. 4 and S. 1179, subsequently proposed by Sen. Nelson, which used "nonforfeitable" instead of "vested", still contained the same definition of "nonforfeitable pension benefit". Amendment No. 496 to S. 4, 93d Cong., 1st Sess., § 501(20) (1973), I LEG. HIST. at 1414-15. The bill which ultimately passed the Senate retained this definition. H.R. 2, *as amended,* 93d Cong., 2d Sess., § 502(a)(20) (1974), III LEG. HIST. at 3745.

The version of H.R. 2 originally reported by the House Committee on Education & Labor defined the term "nonforfeitable" in a similar manner. H.R. 2, *as amended,* 93d Cong., 1st Sess., § 3(19) (1973), II LEG. HIST. at 2251-2. This Committee subsequently reported a substitute bill, H.R. 12906, which contained a definition of "nonforfeitable" much like the present text of § 3(19). H.R. 12906, 93d Cong., 2d Sess., § 3(19) (1974), II LEG. HIST. at 2772. This substitute was passed by the House in the form of an amendment to H.R. 2. H.R. 2, *as amended,* 93d Cong., 2d Sess., § 3(19) (1974), III LEG. HIST. at 3909. The Conference Committee adopted the portion of the House bill containing this definition of "nonforfeitable". Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 11 (1974), III LEG. HIST. at 4286.

However, there is *no* indication either in the comments accompanying H.R. 12906, or in the Conference Committee Report, that this adjustment in the definition was intended to be a substantive change. Indeed, neither contains any reference to the change. Both make it clear that Title IV was still intended to guaranty *vested* rights. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 368 (1974), III LEG. HIST. at 4635; 120 CONG. REC. 3977, 3999 (Feb. 25, 1974) (material explaining H.R. 12906), II LEG. HIST. at 3294, 3346.

This is apparent in both the language and the legislative history of Title IV.

Section 2(a)[50] recites Congress's finding that "many employees with long years of employment are losing anticipated retirement benefits . . . owing to the termination of plans before requisite funds have accumulated." Section 4002(a), 29 U.S.C. § 1302(a), recites the purpose of Title IV to be accomplished by PBGC: "(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants; [and] (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries . . ." Title IV was made effective on September 2, 1974. § 4082(a), 29 U.S.C. § 1381(a). The guaranty of benefits was retroactive to July 1, 1974. § 4082(b), 29 U.S.C. § 1381(b). During that two month "window", there was no § 4062 liability.[51] This "window", read against the purpose clauses, suggests urgency, not postponement.

During the floor debate on passage of the final Act, Sen. Javits[52] addressed the urgent need for immediate effect:

> Probably one of the most difficult problems confronted by the conferees was the selection of effective dates for the insurance program, and here both Senate and House conferees worked diligently to arrange a structure of effective dates that would bring the insurance

[50] 29 U.S.C. § 1001(a), *quoted in* note 27, *supra.*

[51] *See:* note 29, *supra.*

[52] The Seventh Circuit inaccurately attributes the quote to Sen. Williams. 592 F.2d at 958, Appendix to the Petition at 18. Sen. Javits was a co-sponsor of the Senate bill (S. 4), and a leading Senate conferee, with Sen. Williams. Sen. Williams, for his part, commented that the insurance provisions were made effective July 1, 1974, in order to provide "prompt and effective protection" for employees. 120 CONG. REC. 29931 (Aug. 22, 1974) (remarks of Sen. Williams), III LEG. HIST. at 4742.

> protection generally into effect as quickly as possible. This was done in recognition of the fact that depressed economic conditions in certain regions created the possibility that a number of plans were in critical straits and were terminating or were likely to do so imminently. Lack of immediate protection for beneficiaries in these cases involved workers who had earned or were drawing pensions notwithstanding the new provisions of the bill which have a delayed effective date.
>
> This insurance coverage will be available for single employer plans terminating as of July 1 of this year [1974], and discretion is provided to cover multiemployer plans that terminate prior to the mandatory coverage date of January 1, 1978. In order to accomplish these purposes, it was necessary to afford the Pension Benefit Insurance Corporation emergency authority to institute insurance protection on a "crash" basis and the Labor Department has provided invaluable assistance in recommending procedures that would expedite the handling of terminations during this period. Naturally, the institution of "crash" procedures during the startup of a new and untried program is bound to create some administrative difficulties, but the conferees expect the fullest cooperation from employers, trade unions, plan administrators and others in this connection. [120 CONG. REC. 29940 (Aug. 22, 1974) (remarks of Sen. Javits), III LEG. HIST. at 4766-7]

Earlier, the Conference Committee had rejected an attempt to delay the effective date of Title IV's guaranty.[53]

[53] Under the bill which passed the Senate, the benefit guaranty provisions of Title IV only applied to plan years beginning after December 31, 1976. In contrast, the House bill made the benefit guaranty provisions effective for plan years beginning after June 1, 1974. The Conference Committee adopted an early effective date, as did the House, but settled on July 1st. H.R. 2, *as amended*, 93d Cong., 2d Sess., § 482(c) (1974), III LEG. HIST. at 3740-1; H.R. 2, *as amended*, 93d Cong., 2d Sess., § 416(b) (1974), III LEG. HIST. at 4041; Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 245, 380-1 (1974), III LEG. HIST. at 4515, 4647-8.

There was no intent to delay. Nachman cannot cite a single expression of legislative intent, addressed to the final version of Title IV, which contradicts Sen. Javits. At most, they offer general references to the pattern of effective dates in Title I which, as we shall see, are addressed to distinct problems.

B. *Title IV Was Specifically Designed to Guaranty Vested Rights Which Would Otherwise Be Lost Due to Employer Liability Disclaimers.*

The termination insurance provisions, at every point in their development, were said to guaranty "vested" rights.[54] Congress used "vested" and "nonforfeitable" interchangeably both in bills and in debate.[55] The sub-

[54] S. Rep. No. 93-127, 93d Cong., 1st Sess., at 2, 24 (1973), I LEG. HIST. at 588, 610; S. Rep. No. 93-383, 93d Cong., 1st Sess., at 7, 26, 81-2 (1973), I LEG. HIST. at 1075, 1094, 1149-50; 119 CONG. REC. 30136 (Sept. 18, 1973) (analysis of Amendment No. 496), II LEG. HIST. at 1723; H.R. Rep. No. 93-533, 93d Cong., 1st Sess., at 2, 14, 25 (1973), II LEG. HIST. at 2849, 2361, 2372; 120 CONG. REC. 3977, 3999 (Feb. 25, 1974) (material explaining H.R. 12906), II LEG. HIST. at 3294, 3346; *Administration Recommendations to the House and Senate Conferees*, at 45-6 (April 1974), III LEG. HIST. at 5092-3; *Summary of Differences between the Senate and the House Version of H.R. 2*, at 7-9 (June 5, 1974), III LEG. HIST. at 5213-15; Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 368 (1974), III LEG. HIST. at 4635.

[55] The early bills defined "nonforfeitable right" or "vested right" jointly. H.R. 462, 93d Cong., 1st Sess., § 3(26) (1973), I LEG. HIST. at 75; S. 4, 93d Cong., 1st Sess., § 3(26) (1973), I LEG. HIST. at 103; S. 4, *as amended*, 93d Cong., 1st Sess., § 3(26) (1973), I LEG. HIST. at 494-5. Throughout the legislative consideration of ERISA, there are references to "vested (*i.e.*, nonforfeitable) rights", or the use of equivalent forms of apposition. 120 CONG. REC. 29929 (Aug. 22, 1974) (remarks of Sen. Williams), III LEG. HIST. at 4734; 120 CONG. REC. 29953 (Aug. 22, 1974) (remarks of Sen. Nelson), III LEG. HIST. at 4800; H.R. Rep. No. 93-807, 93d Cong., 2d Sess., at 53 (1974), II LEG. HIST. at 3173; H.R. No. 93-779, 93d Cong., 2d Sess., at 51 (1974), II LEG. HIST. at 2640; 120 CONG. REC. 3989 (Feb. 25, 1974) (material explaining H.R. 12906), II LEG. HIST. at 3322; S. Rep. No. 93-383, 93d Cong., 1st Sess., at 44 (1973), I LEG. HIST. at 1112; and 119 CONG. REC. 30139 (Sept. 18, 1973) (remarks of Sen. Tunney), II LEG. HIST. at 1730.

stitution of "nonforfeitable" for "vested" in Title IV indicates no change of intent.[56] It was, as the Court

[56] The two bills originally introduced in the Senate, S. 4 and S. 1179, both insured "vested" rights. S. 4, 93d Cong., 1st Sess., § 402 (a) (1973), I LEG. HIST. at 137; S. 1179, 93d Cong., 1st Sess., § 401 (a) (1973), I LEG. HIST. at 263. As reported by the Senate Committee on Labor & Public Welfare, S. 4 still insured "vested" rights. S. 4, *as amended*, 93d Cong., 1st Sess., § 402(a) (1973), I LEG. HIST. at 532. The version of S. 1179, reported by the Senate Committee on Finance, however, for the first time substituted the term "nonforfeitable" for "vested" in the termination insurance provisions. S. 1179, *as amended*, 93d Cong., 1st Sess., § 422(a) (1973), I LEG. HIST. at 908-9. The accompanying report made it clear that, despite the change in terminology, the termination insurance provisions were still intended to guaranty "vested" rights. S. Rep. No. 93-383, 93d Cong., 1st Sess., at 7, 26, 81-2 (1973), I LEG. HIST. at 1075, 1094, 1149-50. Sen. Nelson subsequently introduced an amendment to S. 4 which reconciled S. 4 and S. 1179. Although this amendment used "nonforfeitable", Amendment No. 496, 93d Cong., 1st Sess., § 422(a) (1973), I LEG HIST. at 1373, Sen. Nelson's written analysis explained that the termination insurance provisions were intended to guaranty "vested" rights. 119 CONG. REC. 30136 (Sept. 18, 1973) (analysis of Amendment No. 496), II LEG. HIST. at 1723. During the debates, prior to passage of this Amendment, it was absolutely clear that this substitution did not constitute a *substantive* change, and that Title IV was still intended to guaranty "vested" rights. 119 CONG. REC. 30039-40 (Sept. 18, 1973) (remarks of Sen. Nelson), II LEG. HIST. at 1628-30; 119 CONG. REC. 30139 (Sept. 18, 1973) (remarks of Sen. Tunney), II LEG. HIST. at 1730; 119 CONG. REC. 30061 (Sept. 18, 1973) (remarks of Sen. Taft), II LEG. HIST. at 1665-6.

The bill originally introduced in the House, H.R. 462, insured against "loss of benefits derived from vested rights". H.R. 462, 93d Cong., 1st Sess., § 202(a) (1973), I LEG. HIST. at 81-2. As reported by the House Committee on Education & Labor, this bill still insured "vested" rights. H.R. 2, *as amended*, 93d Cong., 1st Sess., § 402(a) (1973), II LEG. HIST. at 2320-1. This Committee subsequently reported out a substitute bill, H.R. 12906, which, for the first time, used "nonforfeitable". H.R. 12906, 93d Cong., 2d Sess., § 409(b) (1974), II LEG. HIST. at 2887. The report on this substitute, though, still made it clear that the termination insurance provisions were intended to guaranty "vested" rights. 120 CONG. REC. 3977, 3999 (Feb. 25, 1974) (material explaining H.R. 12906), II LEG. HIST. at 3294, 3346. The debates preceding passage show that the Members still understood the bill to guaranty "vested" rights.

[Footnote continued]

below noted, simply a technical, conforming amendment.[57]

It was commonly understood that benefits vested, notwithstanding liability exclusion clauses, or anything else having to do with funding. Congress used the term in its traditional sense.[58] There is no indication of a different usage.

120 CONG. REC. 4283 (Feb. 26, 1974) (remarks of Rep. Gaydos), II LEG. HIST. at 3382; 120 CONG. REC. 4315 (Feb. 26, 1974) (remarks of Rep. Burke), II LEG. HIST. at 3471; 120 CONG. REC. 4279 (Feb. 26, 1974) (remarks of Rep. Brademas), II LEG. HIST. at 3373; 120 CONG. REC. 4780 (Feb. 28, 1974) (remarks of Rep. Drinan), III LEG. HIST. at 3590. The staff report, as well as the Administration report, to the Conference Committee, described the termination insurance provisions of both House and Senate bills as guaranteeing "vested" rights. *Summary of Difference between the Senate and the House Version of H.R. 2*, at 7-9 (June 5, 1974), III LEG. HIST. at 5213-15; *Administration Recommendations to the House and Senate Conferees*, at 45-6 (April 1974), III LEG. HIST. at 5092-3. The Conference Committee itself described the bill which it reported as guaranteeing "vested" rights. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 368 (1974), III LEG. HIST. at 4635.

During the final floor debates, it was universally recognized that the new Act would insure "vested" rights. 120 CONG. REC. 29206 (Aug. 20, 1974) (remarks of Rep. Brademas), III LEG. HIST. at 4694; 120 CONG. REC. 29209 (Aug. 20, 1974) (remarks of Rep. Tiernan), III LEG. HIST. at 4702; 120 CONG. REC. 29929, 29931 (Aug. 22, 1974) (remarks of Sen. Williams), III LEG. HIST. at 4734, 4741; 120 CONG. REC. 29935 (Aug. 22, 1974) (remarks of Sen. Javits), III LEG. HIST. at 4752.

[57] 592 F.2d at 955 note 10, Appendix to Petition at 12-13 note 10. Representatives of the Secretary of Labor testified that "there is a problem of defining the accrued benefit which will be insured. . . . [W]e probably need to get some consistency between accrued benefits definition for purposes of Internal Revenue as well as for purposes of termination insurance." *Hearings before the Subcommittee on Private Pension Plans of the Senate Committee on Finance*, 93d Cong., 1st Sess., Part I, at 437 (1973). Sen. Bentsen responded favorably to the notion of consistent definitions, but emphasized that the intent was still to insure "vested" benefits. *Id.*, at 443. Sen. Bentsen's bill, S. 1179, as reported by the Committee on Finance, was the first to substitute "nonforfeitable".

[58] D. McGill, PRESERVATION OF PENSION BENEFIT RIGHTS, 6 (1972). *See:* notes 67 & 68, *infra*, and accompanying text.

Title IV was designed to solve the problem of benefit loss resulting from termination prior to the accumulation of sufficient funds.[59] This happened because of insolvency, or liability disclaimer, or both. Most plans have disclaimers, as Congress well knew.[60] The disclaimers were, as Congress knew equally well, most frequently the source of the problem.[61] The *cause célebrè*, leading to the en-

[59] Committee reports all describe the purpose of termination insurance as being to guaranty that employees receive their "vested" pension benefits in situations where plans are terminated without sufficient funds to pay for all vested liabilities. S. Rep. No. 93-127, 93d Cong., 1st Sess., at 10 (1973), I LEG. HIST. at 596; S. Rep. No. 93-383, 93d Cong., 1st Sess., at 3, 17, 25-6, 78 (1973), I LEG. HIST. at 1071, 1085, 1093-4, 1146; 119 CONG. REC. 30136 (Sept. 18, 1973) (analysis of Amendment No. 496), II LEG. HIST. at 1723; H.R. Rep. No. 93-533, 93d Cong., 1st Sess., at 1-2 (1973), II LEG. HIST. at 2348-9; 120 CONG. REC. 3977 (Feb. 25, 1974) (material explaining H.R. 12906), II LEG. HIST. at 3294.

This point was repeated in the debates. 119 CONG. REC. 7423 (March 13, 1973) (remarks of Sen. Bentsen), I LEG. HIST. 226; 119 CONG. REC. 30039-40 (Sept. 18, 1973) (remarks of Sen. Nelson), II LEG. HIST. at 1628-9; 119 CONG. REC. 30042 (Sept. 18, 1973) (remarks of Sen. Bentsen), II LEG. HIST. at 1635-6; 120 CONG. REC. 4279 (Feb. 26, 1974) (remarks of Rep. Brademas), II LEG. HIST. at 3373; 120 CONG. REC. 4282 (Feb. 26, 1974) (remarks of Rep. Gaydos), II LEG. HIST. at 3382; 120 CONG. REC. 4318-19 (Feb. 26, 1974) (remarks of Rep. Annunzio), II LEG. HIST. at 3479; and 120 CONG. REC. 29206 (Aug. 20, 1974) (remarks of Rep. Brademas), III LEG. HIST. at 4694.

[60] Prior to ERISA the standard pension plan disclaimed employer liability for underfunding. *Hearings on H.R. 1269 before the Subcommittee on Labor of the House Committee on Education & Labor*, 92d Cong., 1st Sess., at 164 (1972); Greenough & King, PENSION PLANS AND PUBLIC POLICY, at 194 (1976); D. McGill, FULFILLING PENSION EXPECTATIONS, at 112, 240 (1962). Congress was aware of this fact in enacting Title IV. 120 CONG. REC. 4318 (Feb. 26, 1974) (remarks of Rep. Annunzio), II LEG. HIST. at 3479; 120 CONG. REC. 4285 (Feb. 26, 1974) (remarks of Rep. Erlenborn), II LEG. HIST. at 3388-9; and S. Rep. No. 92-634, 92d Cong., 2d Sess., at 74 (1972).

[61] The study of pension plan terminations prepared by the Departments of Treasury and Labor, on which Congress relied heavily, revealed that only 3% of the employees who lost benefits in 1972

[Footnote continued]

actment of Title IV, was the termination of Studebaker's plan in South Bend, Indiana. The benefit loss there resulted from the usual disclaimer.[62] Title IV was the remedy for the "Studebaker problem".[63]

The legislative history refutes Nachman's assertion that the guaranty of § 4022 was tied to the minimum

worked for employers having a net worth less than the employee benefit loss. Also, 71% of the employees worked for employers with a net worth of at least 1000 times greater than the benefits lost. Depts. of Treasury & Labor, STUDY OF PENSION PLAN TERMINATIONS at 61 (1973). Congress repeatedly cited this study as showing the need for termination insurance. S. Rep. No. 93-383, 93d Cong., 1st Sess., at 79 (1973), I LEG. HIST. at 1147; H.R. Rep. No. 93-779, 93d Cong., 2d Sess., at 13 (1974), II LEG. HIST. at 2602; 119 CONG. REC. 30042 (Sept. 18, 1973) (remarks of Sen. Bentsen), II LEG. HIST. at 1635; 120 CONG. REC. 4279 (Feb. 26, 1974) (remarks of Rep. Brademas), II LEG. HIST. at 3373; 120 CONG. REC. 4780 (Feb. 28, 1974) (remarks of Rep. Drinan), III LEG. HIST. at 3590; and 120 CONG. REC. 29206 (Aug. 20, 1974) (remarks of Rep. Brademas), III LEG. HIST. at 4694. As early as 1971, the Senate Subcommittee on Labor had concluded: "The need for or desirability of insurance arises because of the numerous contingencies which can result in . . . termination . . . . Employers ordinarily have no financial responsibility for pension payments beyond the contributions they are committed to make." *Interim Report of Activities of the Private Welfare & Pension Plan Study, Senate Committee on Labor & Public Welfare, Subcommittee on Labor*, 92d Cong., 2d Sess., at 74 (1971).

[62] *Hearings on Private Pension Plans before the Subcommittee on Fiscal Policy of the Joint Economic Committee*, 89th Cong., 2d Sess., at 126-7 (April 27, 1966) (testimony of W. Solenburger).

[63] S. Rep. No. 93-127, 93d Cong., 1st Sess., at 10 (1973), I LEG. HIST. at 596; S. Rep. No. 93-383, 93d Cong., 1st Sess., at 17, 25-6, 78 (1973), I LEG. HIST. at 1085, 1093-4, 1146; H.R. Rep. No. 93-779, 93d Cong., 2d Sess., at 13 (1974), II LEG. HIST. at 2602; 119 CONG. REC. 30037 (Sept. 18, 1973) (remarks of Sen. Nelson), II LEG. HIST. at 1622; 119 CONG. REC. 30042-3 (Sept. 18, 1973) (remarks of Sens. Bentsen & Javits), II LEG. HIST. at 1635, 1639; 119 CONG. REC. 30061 (Sept. 18, 1973) (remarks of Sen. Taft), II LEG. HIST. at 1665-6; 120 CONG. REC. 4279-80 (Feb. 26, 1974) (remarks of Rep. Brademas), II LEG. HIST. at 3373-4; 120 CONG. REC. 29206 (Aug. 20, 1974) (remarks of Rep. Brademas), III LEG. HIST. at 4694.

vesting standards of § 203. Both House and Senate bills guaranteed "vested" benefits.[64] Whereas the House bill covered rights vested under the bill's minimum vesting standards, the Senate bill guaranted rights vested under the plan.[65] The Conference Committee chose the Senate version.[66] There was no intent to link the guaranty to the vesting rules, much less their effective date.

Section 203 was enacted to remedy the abuse of overly restrictive vesting requirements.[67] There was no mention

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[64] *See:* note 54, *supra.*

[65] H.R. 2, *as amended,* 93d Cong., 2d Sess., § 409(b) (1974), III LEG. HIST. at 4024; H.R. 2, *as amended,* 93d Cong., 2d Sess., § 422 (a) (1974), III LEG. HIST. at 3702; *Summary of Differences between the Senate Version and the House Version of H.R. 2,* at 7-8 (June 5, 1974), III LEG. HIST. at 5213-14; *Administration Recommendations to the House and Senate Conferees,* at 45 (April 1974), III LEG. HIST. at 5092.

[66] Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 225, 368 (1974), III LEG. HIST. at 4495, 4635; *Summary of Differences between the Senate Version and the House Version of H.R. 2,* at 9 (June 5, 1974), III LEG. HIST. at 5215; *Administration Recommendations to the House and Senate Conferees on H.R. 2,* at 46 (April 1974), III LEG. HIST. at 5093; and 120 CONG. REC. 29937 (Aug. 22, 1974) (remarks of Sen. Javits), III LEG. HIST. at 4757-8.

[67] Committee Reports characterize the minimum vesting standards as insuring that employees with long years of service would not lose their pension benefits because of a pre-retirement separation from employment. Many plans contained lengthy vesting requirements, or only vested an employee's pension rights on retirement. In addition to the resulting hardship, the failure to vest was inequitable, since pension contributions were typically in lieu of other compensation. Older workers lost pension rights by being discharged shortly before retirement. Abusive vesting rules were also a major obstacle to mobility. S. Rep. No. 93-127, 93d Cong., 1st Sess., at 8-9 (1973), I LEG. HIST. at 594-5; S. Rep. No. 93-383, 93d Cong., 1st Sess., at 3, 14, 45-6 (1973), I LEG. HIST. at 1071, 1082, 1113-14; 119 CONG. REC. 30134 (Sept. 18, 1973) (analysis of Amendment No. 496), II LEG. HIST. at 1718; H.R. Rep. No. 93-533, 93d Cong., 1st Sess., at 6 (1973), II LEG. HIST. at 2353; H.R. Rep. No. 93-779, 93d Cong., 2d Sess., at 3, 11-12, 52 (1974), II LEG. HIST. at 2592, 2600-01, 2641; H.R. Rep. No. 93-807, 93d Cong., 2d Sess., at 3, 11-12, 18-19, 53 (1974), II LEG. HIST. at 3123, 3131-2, 3138-9, 3173;

[Footnote continued]

of liability disclaimers or asset insufficiency. On the contrary, Title I was said to be unable to correct those problems. Title IV served *that* purpose.[68]

It is true that Congress intended to delay the cost impact of Title I's minimum vesting rules. But, even under PBGC's reading, Nachman still benefits from that delay. PBGC guarantees rights *already* vested under the plan. Here, both normal and early retirement rights were

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120 CONG. REC. 3978, 3985, 3989 (Feb. 25, 1974) (material explaining H.R. 12906), II LEG. HIST. at 3296, 3313, 3323.

The debates show the same purposes. 119 CONG. REC. 30004 (Sept. 18, 1973) (remarks of Sen. Williams), II LEG. HIST. at 1602, 119 CONG. REC. 30038 (Sept. 18, 1973) (remarks of Sen. Nelson), II LEG. HIST. at 1624; 119 CONG. REC. 30010-11 (Sept. 18, 1973) (remarks of Sen. Beall), II LEG. HIST. at 1619-20; 119 CONG. REC. 30041-2 (Sept. 18, 1973) (remarks of Sen. Bentsen), II LEG. HIST. at 1634; 120 CONG. REC. 4281-2 (Feb. 26, 1974) (remarks of Rep. Gaydos), II LEG. HIST. at 3379; 120 CONG. REC. 4775 (Feb. 28, 1974) (remarks of Rep. Grasso), III LEG. HIST. at 3578; 120 CONG. REC. 29214 (Aug. 20, 1974) (remarks of Rep. Daniels), III LEG. HIST. at 4716; 120 CONG. REC. 29929 (Aug. 22, 1974) (remarks of Sen. Williams), III LEG. HIST. at 4734-5; and 120 CONG. REC. 29949 (Aug. 22, 1974) (remarks of Sen. Bentsen), III LEG. HIST. at 4791-2.

[68] S. Rep. No. 93-383, 93d Cong., 1st Sess., at 25-6 (1973), I LEG. HIST. at 1093-4; 119 CONG. REC. 30042 (Sept. 18, 1973) (remarks of Sen. Bentsen), II LEG. HIST. at 1635-6; 119 CONG. REC. 30004-5 (Sept. 18, 1973) (remarks of Sen. Williams), II LEG. HIST. at 1602-3; 120 CONG. REC. 4282-3 (Feb. 26, 1974) (remarks of Rep. Gaydos), II LEG. HIST. at 3382; 120 CONG. REC. 4288 (Feb. 26, 1974) (remarks of Rep. Biaggi), II LEG. HIST. at 3396; 120 CONG. REC. 29950 (Aug. 22, 1974) (remarks of Sen. Bentsen), III LEG. HIST. at 4792-3; 120 CONG. REC. 29953 (Aug. 22, 1974) (remarks of Sen. Nelson), III LEG. HIST. at 4802. *See also:* S. Rep. No. 93-127, 93d Cong., 1st Sess., at 8-10 (1973), I LEG. HIST. at 594-6; S. Rep. No. 93-383, 93d Cong., 1st Sess., at 3, 14-17, 25-6, 45, 78 (1973), I LEG. HIST. at 1071, 1082-5, 1093-4, 1113, 1146; 119 CONG. REC. 30136 (Sept. 18, 1973) (analysis of Amendment No. 496), II LEG. HIST. at 1718, 1723; H.R. Rep. No. 93-533, 93d Cong., 1st Sess., at 1-2 (1973), II LEG. HIST. at 2348-9; 120 CONG. REC. 3977 (Feb. 25, 1974) (material explaining H.R. 12906), II LEG. HIST. at 3294.

vested after 10 years of service.[69] These provisions already met the minimum vesting standards.[70] However, as the Plan stood at termination, disability and deferred pensions required at least 15 years of service.[71] As to these rights, the Plan fell short of all of three vesting options in § 203(a)(1)(A)-(C).[72] To comply, it would have had to vest these rights at, *e.g.*, 10 years of service. PBGC here only seeks to guaranty the disability and deferred pensions on the 15 year assumption.[73] PBGC does *not* assume, in calculating the guaranty *or the § 4062 liability*, that the plan has been amended to meet the minimum vesting rules. The effect here is to reduce the guaranty, and Nachman's § 4062 liability, by the differential cost of the more restrictive, pre-1976 vesting provisions in the Plan.[74]

Unlike Title I, there was no intent to delay the cost impact of Title IV.[75] Rather than delay, Congress moderated potential § 4062 liability. PGBC only guarantees basic benefits, and even that guaranty is subject to a five year phase-in.[76] Non-vested rights are not guaran-

[69] Art. VII § 1(a) & (b), at A. 28.

[70] § 203(a)(2)(A), 29 U.S.C. § 1053(a)(2)(A), at Ad. 5.

[71] Art. VII § 1(c) & (d), at A. 28.

[72] 29 U.S.C. § 1053(a)(1)(A)-(C), at Ad. 5-6.

[73] Prior to 1976, plans requiring 20 year vesting, *e.g.*, *Daniel* v. *Teamsters*, 439 U.S. 551, —— (1979), 99 S. Ct. 790, 794, 58 L. Ed. 2d 808, 813, or even vesting only on retirement, were guaranteed on *those* assumptions.

[74] *Contrast: Allied Structural Steel Co.* v. *Spannus*, 438 U.S. 234 (1978), where the Minnesota act, in effect, required immediate 10 year vesting, and then imposed a termination liability on *that* vesting assumption, rather than the plan's.

[75] *See*: Part II(A) *supra*.

[76] *See*: note 41 *supra*; and § 4022, 29 U.S.C. § 1322.

teed. Section 4062 liability is not generated by such non-basic or non-vested rights, even on PBGC's reading. Liability is further limited to 30% of the employer's net worth.[77] PBGC has authority to "arrange reasonable terms" for payment of § 4062 liability.[78]

As the Seventh Circuit found, § 4062 is *much more* than a subrogation scheme.[79] It is an independent statutory liability. It has nothing to do with subrogation, except that it takes its measure, in part, from rights vested under the Plan and the relative solvency of the fund. Statutory liabilities commonly take their measure from private arrangements.[80]

Congress enacted § 4062 to prevent employers from shifting the burden of vested liabilities to Title IV. Two abuses were perceived: employers making irresponsible benefit promises;[81] and, more important, needless termination of plans by solvent employers.[82] During the final floor debates, Sen. Williams spoke to the importance of avoiding such terminations:

> Since there would be a possibility of abuse by solvent employers who terminate a plan and shift the financial burden to the insurance program, notwithstand-

[77] § 4062(b)(2), 29 U.S.C. § 1362(b)(2), at Ad. 7-8.

[78] § 4067, 29 U.S.C. § 1367.

[79] 592 F. 2d at 957, Appendix to the Petition at 17.

[80] *See, e.g.*: Title 26, U.S.C. (1979).

[81] S. Rep. No. 93-383, 93d Cong., 1st Sess., at 87 (1973), I Leg. Hist. at 1155; 119 Cong. Rec. 30136 (Sept. 18, 1973) (analysis of Amendment No. 496), II Leg. Hist. at 1723.

[82] 120 Cong. Rec. 29931 (Aug. 22, 1974) (remarks of Sen. Williams), III Leg. Hist. at 4741; 120 Cong. Rec. 4283 (Feb. 26, 1974) (remarks of Rep. Gaydos), II Leg. Hist. at 3382; 120 Cong. Rec. 4285 (Feb. 26, 1974) (remarks of Rep. Erlenborn), II Leg. Hist. at 3388; 119 Cong. Rec. 30039 (Sept. 18, 1973) (remarks of Sen. Nelson), II Leg. Hist. at 1628.

ing their financial ability to continue funding the plan, the Conference bill imposes liability on employers whose plans terminate to reimburse the program for benefits paid by the corporation [PBGC]. [120 CONG. REC. 29931 (Aug. 22, 1974) (remarks of Sen. Williams), III LEG. HIST. at 4741]

This abuse is present here. Nachman did not have to terminate, it could have "frozen" the Plan.[83] This alternative has practical advantages. There is no danger of PBGC asserting § 4062 liability, because there is no termination. There is no frustration of participants' expectations. Nachman, instead, chose to terminate. In doing so, it transgressed the Congressional purpose in Title IV.[84] It cannot now complain that PBGC demands the statutory price for that transgression.

III

Nachman's Reading of "Nonforfeitable" Proves Too Much.

The linchpin of Nachman's argument is that "nonforfeitable", both before and after 1976, means absolutely no conditions on possession of pension rights, related to funding or otherwise.[85] Nachman urges this meaning of

[83] That is, the Plan could have been amended so that credited service ceased to accrue prospectively. This eliminates "normal cost". Existing past service liabilities are paid over the remainder of the funding cycle, without acceleration. The plan continues. It does not terminate, so PBGC has no occasion to get involved. Benefits continue to be paid, at the anticipated level, when due. PBGC, GUIDELINES ON VOLUNTARY TERMINATION, at 4-5 (1977). *See, generally*: note 8, *supra*.

[84] § 4002(a, 29 U.S.C. § 1302(a). *See:* Part II(A), *supra*.

[85] Nachman's Brief at 22-31. It admits the statutory exceptions in § 203(a)(3)(A)-(D), 29 U.S.C. § 1053(a)(3)(A)-(D), *e.g.*, resumption of employment in the industry, *Riley* v. *MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977), *on remand* 452 F. Supp. 117 (S.D. N.Y. 1978), *aff'd* 586 F.2d 968 (2d Cir. 1978).

"nonforfeitable" as the only way to achieve a sensible, consistent use throughout ERISA. But their reading of the term opens dangerous doors, leading to a disturbing post-1976 world. The argument proves too much.

Under Nachman's version of "nonforfeitable", Title IV becomes superfluous in 1976. On Nachman's proofs, as of 1976, no conditions are allowed to interfere with possession of vested pension rights. So, if faced with an interruption of benefits, a participant may simply bring suit to enforce the defined benefit promise against his employer.[86] The disclaimer clause, if raised as a defense, would be stricken as contrary to § 203. This scenario does not require PBGC or Title IV, except in the event of employer insolvency.[87] Such litigation would enforce defined benefit promises, at face value, down to the last jot and title. All the moderating compromises of Title IV are swept away. The 30% limit on § 4062 liability would become meaningless for solvent employers. The five year phase-in, as well as the limitation of the guaranty to basic benefits, would be irrelevant in such litigation. The employer's exposure would expand correspondingly. Nachman asks the Court to embrace something considerably more unsettling than anything the PBGC and the UAW are urging.

Nor does Nachman's argument square with the language of Title IV's provisions. Title IV constantly presumes a difference between pension rights and their satisfaction.[88] Under Nachman's logic, the provisions are

[86] *Cf.*: *Hoefel* v. *Atlas Tack Corp.*, 581 F.2d 1 (1st Cir. 1978), *cert. denied sub nom. Atlas Tack Corp.* v. *Mahoney*, 440 U.S. 913 (1979).

[87] As previously noted, insolvency is the exception. *See*: note 61, *supra*.

[88] In the initial post-Act period, the receiver must determine whether the assets of the plan are sufficient to discharge all obligations with respect to benefits guaranteed under Title IV, § 4004(d), 29 U.S.C. § 1304(d). On plan termination, the administrator must

[Footnote continued]

trivialized. Pre-1976, they can only apply to the very narrow range of instances where the employer is insolvent, and the plan allows recourse. Post-1976, they become superfluous as to solvent employers and their plans.

Even Title I's reporting requirements are trivialized by applying Nachman's reading of § 3(19). Pre-1976, under Nachman's position, there are no "nonforfeitable" rights to report in the summary plan description, annual report, or statement of total benefits accrued.[89]

Finally, Nachman's construction of § 3(19) is at odds with the companion definition of "vested liabilities" in Title I's § 3(25).[90] For Nachman, pre-1976, it is impossible to have vested liabilities under § 3(25) because the typical plan contains the disclaimer. Yet, Nachman admits that the rights are vested in the present case.

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make a similar determination, § 4041(b) & (c), 29 U.S.C. § 1341(b) & (c). PBGC can sue to terminate a plan which is unable to pay benefits when due, § 4042(a)(2), 29 U.S.C. § 1342(a)(2). Failure to pay benefits when due is a reportable event, § 4043(b)(6), 29 U.S.C. § 1343(b)(6). The amount of benefits guaranteed and the fair market value of the assets must be determined and reported, § 4046(2) & (4), 29 U.S.C. § 1346(2) & (4). Section 4062 itself measures liability by the difference between the value of benefits guaranteed, and the value of the plan's assets, § 4062(b), 29 U.S.C. § 1362(b). These provisions were all effective September 2, 1974, *not* January 1, 1976, § 4082(a), 29 U.S.C. § 1381(a).

[89] The summary plan description (SPD) must list provisions providing for nonforfeitable benefits. § 102(b), 29 U.S.C. § 1022(b). The annual report must attach an actuarial statement listing the present value of nonforfeitable benefits. § 103(d)(6), 29 U.S.C. § 1023(d)(6). The statement of benefits accrued must show the nonforfeitable benefits which have accrued, or the "earliest date" on which the benefits will become nonforfeitable. "Earliest date" implies service or age. § 105(a)(2), 29 U.S.C. § 1025(a)(2).

[90] § 3(25), 29 U.S.C. § 1002(25): "The term 'vested liabilities' means the present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are nonforfeitable."

CONCLUSION

For the foregoing reasons, the Court should *affirm* the decision below.

Respectfully submitted,

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November 9, 1979.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 78-1557

NACHMAN CORPORATION,
Petitioner
v.

PENSION BENEFIT GUARANTY CORPORATION,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT PENSION BENEFIT GUARANTY CORPORATION

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BRIEF FOR RESPONDENT PENSION BENEFIT GUARANTY CORPORATION *

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* Throughout this brief, the following abbreviations will be used: "Op." will refer to the Opinion of the Court of Appeals; page references will be to the reprinting of that opinion in the Petition for a Writ of Certiorari in this case. "A." will refer to the record appendix in this case. "Pet. Br." will refer to the brief of petitioner Nachman Corporation. "Concord Br." will refer to the brief *amicus curiae* filed by Concord Control, Inc. "ERISA" or "the Act" will refer to the Employee Retirement Income Security Act of 1974, P.L. No. 93-406, 88 Stat. 829 (1974), 29 U.S.C. §§ 1001-1381 (1975). "Leg. Hist." will refer to the three-volume legislative history of ERISA (GPO, 1976); all citations to bills, debates, and committee reports will be to this compilation. We will refer to sections of the Act as they appear in the statute rather than as they appear in Title 29 of the United States Code. "Title IV" will refer to §§ 4001-4082 of ERISA.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether a benefit payable to a pension plan participant is "nonforfeitable" within the meaning of Section 4022(a) of the Employee Retirement Income Security Act, and thereby guaranteed by the Pension Benefit Guaranty Corporation, where the participant has satisfied by the date of the plan's termination all the conditions required of him under the terms of the plan to be entitled to the benefit, notwithstanding the inclusion in the plan of provisions which limit payment of benefits to the assets of the pension plan and relieve the employer of liability for unfunded benefits.

COUNTERSTATEMENT OF THE CASE

A. The Statutory Framework of this Action.

This case involves the pension plan termination insurance program established by Title IV of ERISA. Title IV established a program to insure the payment of certain pension benefits (defined in § 4022 of the Act) upon the termination of covered pension plans, in the event that a pension plan is funded insufficiently to pay such benefits. Such payments are guaranteed by the Pension Benefit Guaranty Corporation (hereafter "PBGC"), a government corporation established under § 4002 of the Act.

Section 4062 of the Act imposes liability on employers to reimburse PBGC. This is an action by petitioner Nachman, an employer which terminated a pension plan covered by Title IV, against respondent PBGC for a judgment declaring that Nachman is not liable under § 4062.

B. The Factual Background.

We adopt the Court of Appeals' statement of the case:

> Pursuant to collective bargaining with the UAW, in 1960 Nachman established a pension plan for certain employees at its Armitage Avenue facility in Chicago. The plan terms provided for vesting of benefits after employees fulfilled specified age and length-of-service requirements. This pension plan is characteristic of "defined-benefit" plans, promising a fixed monthly benefit level for each year of service. As is typical of a defined-benefit plan, Nachman was required to make annual contributions to a trust fund on an actuarial basis. Those contributions were calculated by reference to administrative costs of the fund, benefit liabilities accruing during the current plan year ("normal costs"), and the amounts necessary to amortize the past service liability over thirty years. The parties do not dispute that Nachman complied fully with the funding obligations imposed by the plan.
>
> On October 1, 1975, Nachman gave timely notice to the UAW that it was terminating the pension plan effective December 31, 1975. The termination accompanied the closing of the Armitage Avenue facility, which had become unprofitable. The propriety of the termination is not challenged.
>
> It is also undisputed that the assets in the trust fund are insufficient to pay all the vested benefits which accrued before December 31, 1975. Apparently the fund assets can provide only thirty-five percent of the accrued vested benefits. Under the terms of the plan, the employees' benefits would be reduced ratably. Nachman would not be obligated to assume liability for the unfunded benefits. Article V, section 3 of the plan provides:

> Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. In the event of termination of th[e] Plan, there shall be no liability or obligation on the part of the company to make any further contribution to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid.

Op. 2-3 (footnote omitted).

C. Proceedings Below.

Nachman brought an action for declaratory relief to determine whether Title IV imposes liability on it under § 4062 of the Act. The United States District Court for the Northern District of Illinois granted summary judgment in Nachman's favor, 436 F. Supp. 1334 (N.D. Ill. 1977), holding that Congress did not intend until January 1, 1976, to subject employers to liability for unfunded pension benefits which they had disclaimed. Since Nachman terminated the pension plan prior to that date, it was found not subject to statutory liability.

The Court of Appeals for the Seventh Circuit reversed, 592 F.2d 947 (7th Cir. 1978). In an opinion written by Judge Sprecher, the court held unanimously that because the participants' pension benefits were unconditionally vested under the terms of the Nachman pension plan, those benefits were "nonforfeitable" within the meaning of § 4022 of the Act and, therefore, guaranteed by PBGC. Accordingly, the court held that Nachman was liable under § 4062 of the Act. Op. 7-18. The court held further that Title IV did not violate the Due Process clause of the Fifth Amendment because it is a rational means to a legitimate end. Op. 19-29.

On June 18, 1979, this Court granted *certiorari* limited to the question of whether the Court of Appeals' interpretation of the statute was correct,[1] —— U.S. ——, 99 S. Ct. 2881 (June 18, 1979).

SUMMARY OF ARGUMENT

A. As a result of almost a decade of study, Congress identified some serious defects in the private pension system. ERISA was the legislative response. Particularly serious, in Congress' view, was that the promise of a pension often turned out to be illusory for either of two reasons: (1) The standards of eligibility were so restrictive that only a small minority of employees ever qualified for a pension; and (2) pension plans terminated because of plant closings or for other reasons with insufficient assets to pay the benefits which the plan participants had earned.

Congress addressed the first of these problems by establishing minimum standards on vesting, participation and other plan terms in Titles I and II of the Act. It responded to the second problem by providing in Title IV for a separate plan termination insurance program whereby a government corporation (PBGC) would guarantee benefits which are "nonforfeitable . . . under the terms of a [pension] plan." § 4022(a). In order to protect this insurance system and to help finance it, Title IV also provides that employers should be liable to PBGC for the amount of insufficiency, up to 30 percent of the employer's net worth.

---

[1] *Amicus* Concord seeks to inject a constitutional issue. Concord Br. 8. In denying *certiorari* on the constitutional issue, this Court had before it the well-reasoned opinion of the Court of Appeals which dealt at length with constitutionality and the arguments in PBGC's Brief in Opposition to *certiorari*, pp. 7-14. This Court limited review to the question of statutory interpretation. Therefore, we will limit our response to the scope of the grant of *certiorari*.

The vesting and funding standards, which require extensive adjustments to ongoing plans, became effective (with exceptions not relevant here) for plan years beginning after December 31, 1975. The termination insurance program became effective immediately upon the enactment of ERISA, *i.e.*, September 2, 1974. The issue in this case is whether benefits are guaranteed by ERISA where a plan terminates with insufficient assets to pay benefits which had "vested in a contractual sense," Pet. Br. 28, but before the effective date of the vesting and funding standards, where the terms of the plan limited payment of benefits to the assets available in the plan.

Petitioner's position, that benefits which were "vested in a contractual sense," Pet. Br. 28, under its plan are not "nonforfeitable" and not insured under Title IV, would effectively reverse the Congressional judgment that such benefits should be insured from the date of enactment. Petitioner's position that plan provisions which limit recovery of benefits to the assets of a plan are contrary to the statutory vesting standards, and thus were banned when those standards became effective in 1976, could subject employers to liability greater than Title IV imposes. (Clearly there is no such ban; a current IRS model plan includes similar provisions.) Thus, petitioner's position bears no rational relationship to the Congressional design, *i.e.*, either for employees or for employers.

B. Congress was well aware that pension plan participants and beneficiaries who lost benefits because a plan was insufficiently funded on termination had no recourse against their employers. Congress found that the typical pension plan included language disclaiming the employer's liability beyond contributions to the plan, and provided that participants could look only to the assets of the fund for payment. Congress chose not to declare such disclaimers contrary to public policy, but rather to insure, through PBGC, pension benefits which were lost

on plan termination. § 4022(a). And in § 4062 it imposed liability to the PBGC on employers as described above. The statutory liability does not create a contractual obligation to the plan on the part of employers, but was designed to reimburse the PBGC, within limits, for the liabilities it incurs. In sum, as the Court of Appeals said, "the purpose of Title IV was to guarantee benefits that might be lost because of employer liability disclaimers." Op. 14.

C. Petitioner's interpretation of "nonforfeitable" [2] cannot be squared with the statutory priorities which the administrator of an defined benefit plan must follow in allocating the assets of a plan on termination. Section 4044(a), the mandatory allocation provision, recognizes by its very terms that "nonforfeitable" benefits include some which the plan does not have adequate assets to provide on termination. If benefits were "nonforfeitable" only if there are sufficient assets to pay them in the event of termination, there would be no need to establish an order of priority among "nonforfeitable" benefits for the allocation of the plan assets.

Petitioner's interpretation also conflicts with the funding requirements of Titles I and II. Those provisions allow the funding of promised benefits to be amortized over 30 to 40 years. § 302 of ERISA and I.R.C. § 412 (added by ERISA). These sections anticipate that nonforfeitable benefits may be underfunded at termination, and thus belie petitioner's contention that "full funding" is a condition of nonforfeitability.

D. Congress carefully and deliberately chose to make the termination insurance program effective on date of

---

[2] Nachman contends that a benefit cannot be considered "nonforfeitable" under Title IV if its payment is conditioned upon the availability of assets. Pet. Br. 16.

enactment, *i.e.*, September 2, 1974. Indeed, the PBGC was to pay benefits with respect to certain plan terminations occurring after June 30, 1974. Employer liability under § 4062 came into effect with the Act, but PBGC was given discretion for the first 270 days to waive or reduce such liability "to avoid unreasonable hardship [where] the employer was not able, as a practical matter, to continue the plan." The vesting and funding requirements of Titles I and II did not go into effect with respect to existing plans until January 1, 1976, with exceptions not relevant here. The purpose of the 16-month delay was to allow time to amend plans to comply with the new vesting, funding, and participation requirements.

E. PBGC promulgated its definition of "nonforfeitable" for purposes of § 4022(a) pursuant to its statutory authority. The definition of that term is at the heart of PBGC's mission because PBGC cannot guarantee the payment of "nonforfeitable" benefits without being able to determine what those benefits are. Given that responsibility, PBGC's view, embodied in 29 C.F.R. § 2605.6(a), "is a substantial factor to be considered in construing the statute", *Miller* v. *Youakim*, 440 U.S. 125, 144 (1979), particularly since it is a "contemporaneous construction of the statute by the men charged with the responsibility of setting its machinery in motion," *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U.S. 294, 315 (1933).

The Title I definition is not binding for purposes of Title IV because it was adopted only "for purposes of this Title . . . ," *i.e.*, Title I. Titles II and IV contain their own definition sections, each of which repeats some, but not all, of the definitions which are set forth in § 3 of Title I. *E.g.*, § 4001(a)(1) of Title IV defines "administrator" as "the person or persons described in paragraph (16) of § 3 of this Act." Congress would not have expressly incorporated a particular Title I definition

into Title IV if it had understood that the Title I definition "necessarily applied to the other Titles." Pet. Br. 19.

F. Nachman cannot prevail even under the Title I definition of "nonforfeitable" in § 3(19). The Court of Appeals properly found that § 3(19)'s requirements that participant claims be "unconditional" and "enforceable against the plan" were met here. The Court said, "Nachman's employees' claims are enforceable against the plan, they simply may not be collectable." Op. 9. It ruled also that "unconditional" refers only "to those conditions placed on the participant and not to sufficiency of assets," citing leading authority for the proposition that under pre-ERISA terminology pension rights were not considered to be conditional even though they were contingent upon the availability of assets. Op. 9.

Nachman seeks support for its interpretation of "nonforfeitable" in the use of that term in the Internal Revenue Code prior to ERISA. But its examples concern disposition of funds at termination. The issue here is whether nonforfeitability is incompatible with a shortfall of funds at termination. The Internal Revenue Code provisions cited add nothing on this point.

ARGUMENT[3]

A. Introduction

Petitioner Nachman has totally misconceived the statutory design and the unmistakable Congressional intent of ERISA. The Court of Appeals declared that petitioner's theory[3] would import so narrow a purpose to Congress as to make the enactment of Title IV "almost meaningless." Op. 14. The Court of Appeals is right.

Congress studied private pension plans comprehensively during ERISA's decade-long gestation period. Congress found that employers held out to employees the hope of security on retirement through a variety of voluntarily adopted contractual arrangements. Actual results of the pre-ERISA system were not satisfactory, in Congress' view. The promises employees thought had been made to them often did not result in benefit payments.

Congress identified two distinct situations which led to those frustrated employee expectations. One occurred where under the terms of the plan, workers did not acquire enforceable claims despite long years of employment. Some plans, for example, did not provide benefits unless an employee remained on the job until retirement. The result of such arrangements was a high proportion of forfeitures, disappointment for many employees, and comparatively low cost for the sponsors.

The second situation arose when employee claims against a plan could not be realized because the plan

[3] Pursuant to Title III of ERISA, this brief has been submitted to the Department of the Treasury for review, and Treasury concurs in the positions taken in this brief. This brief has also been reviewed by the Department of Labor, and Labor also concurs in the positions taken in this brief.

terminated, bringing into operation typical plan provisions that expressly limited recourse by participants for satisfaction of claims to the funds then in the plan and generally barred recourse against the sponsor. Too often, the result was that benefit payments were a small fraction of the anticipated benefits. Employer-sponsors were generally protected against liability.

Although both problems arise from enforcement of plan terms, they differ in one important respect. The rules that affect an ongoing plan have their impact over a period of time. Termination, on the other hand, immediately seals the financial fate of participants and sponsor alike.

Congress dealt with the two problems differently. The remedy for over-restrictive rules of ongoing plans[4] is in Titles I and II. As before the Act, plan terms govern the basis on which employees acquire claims for benefits. Congress set minimum standards for key plan terms, such as the vesting of rights. After a certain date, every plan must have provisions that meet or exceed the ERISA standard.[5] The minimum standards reflected Congressional balancing between greater satisfaction of employee expectations and the retention of flexibility and protection for sponsors. The minimum standards are lengthy and complex. Congress knew that amending plans to conform to these standards would be a difficult process, complicated by the perceived need for Internal Revenue Service review to assure continuance of preferred tax treatment. For practical purposes, all tax-qualified plans needed conforming amendments and IRS clearance. Thus,

[4] These included participation and vesting rules that often resulted in forfeitures.

[5] The vesting standard sets out three acceptable schedules for granting vested rights; plan provisions would have to match or exceed at least one of them. § 203. The counterpart to this section in the Internal Revenue Code is I.R.C. § 411.

a grace period was essential before this remedy could go into effect. Congress made the standards effective for plan years beginning after December 31, 1975, about 16 months after passage of ERISA. Although some employees were significantly affected by this delay—*i.e.*, those who left a plan during that interim period without the entitlements that plan provisions conforming to the new minimum standards would provide—Congress knew that the great bulk of participants would not be affected. Such participants would still be in the plan when the new rules went into effect, and would benefit from them when their claims for benefits ripened.

Congress had a different solution for the problem of plan termination rules that insulated sponsors and left benefit claims unsatisfied.[6] No changes in plan terms were mandated. Instead, in Title IV Congress enacted a statutory scheme, operating outside the contractual context of the plan, to change the effect of plan termination on participants and sponsors. A new fund supported by premiums paid by defined benefit pension plans, a new agency (PBGC), and a new set of rules of law were created. Under this scheme, the employee's satisfaction of plan conditions for entitlement to benefits is the starting point. PBGC guarantees what the plan defines as the employee's benefit, with certain limitations. The difference between that guarantee and plan funds available at termination may be collected from the sponsor by PBGC, again with significant limitations.

Nothing in this Title IV scheme makes illegal the usual clauses protecting the employer against liability. Removal of those legal protections would have placed

[6] Congress imposed minimum funding schedules, in Titles I and II, to decrease the likelihood that plans would terminate with insufficient funds and leave employee claims unsatisfied. Because these schedules extend 30 years or longer, they do not deal adequately with the problem of terminations with insufficient funds.

employers even more at risk, for claims could then lie against sponsors for amounts which might exceed PBGC guarantees, and without limits that the statute places on PBGC.

The reasons that dictated a grace period for minimum standards were not present here. No plan amendments were required. Only a minority of plans, those that terminated, would feel the force of the new termination law. More important, as the legislative history bears out, there was a strong impetus to make termination insurance effective as soon as possible. Accordingly, Title IV of ERISA was made effective on the date of enactment, September 2, 1974, with exceptions not pertinent in this case. The Act even covered some plan terminations that occurred up to two months earlier.

The PBGC Title IV regulation defining nonforfeitability carries out faithfully the statutory scheme for termination insurance. In this case, it would be applied to determine the nonforfeitable rights of employees. Within statutory limits, guarantees would be extended to those employees.

Nachman's theory bears no relation to the rational, balanced scheme devised by Congress. Instead of focusing on plan terms which measure the claims participants had against the plan, Nachman asserts that plan terms which limit the liability of the employer are dispositive. It was to provide protection for employees notwithstanding those limitation of liability clauses that Congress enacted Title IV. Acceptance of Nachman's position would effectively reverse that Congressional judgment, at least for plans terminating prior to 1976.

Nachman's theory is equally untenable when examined in relation to plan years after the 1976 effective date of minimum standards for vesting and related plan terms. Nachman claims that limitation of liability clauses are

illegal after that time, by operation of the minimum standards. If that were so, employers could be subject to far greater liability than is now the case. In fact, there is no such ban on clauses of the type found in Nachman's plan. Such a protective clause is even found in a model plan issued by the IRS for guidance in drafting post-1976 plans. 1977 *Pension Plan Guide* (CCH ¶ 30,782.96). The same arguments against Title IV coverage made here would apply to any plan with such a clause, so that the true effect of a finding for Nachman on the grounds it advances would be to eviscerate Title IV.

B. Congress Established the Termination Insurance Program of Title IV to Ameliorate the Loss of Earned and Promised Pensions When Plans Terminated with Insufficient Assets and Employers Had Disclaimed Liability.

Congress enacted Title IV to reduce the frustration and human tragedy that had too often resulted from the termination of pension plans with insufficient assets. Congress found "that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits." § 2(a). Congress responded "by requiring plan termination insurance." § 2(c).

One of the major causes for loss of anticipated benefits which had been identified in nearly a decade of Congressional study was the termination of pension plans with insufficient assets to fund the promised benefits. Typically, pension plans, like Nachman's, limited participant recovery to plan assets and freed the employer from any liability other than contributions due to the plan. Pre-ERISA courts normally enforced this disclaimer language and defeated participant expectations. As Senator Williams, the Chairman of the Senate Committee on Labor and Public Welfare, said at the beginning of the debate on the pension reform bill reported by that committee: "Another reason why so many employees have found their pension expectations to be illusory is that the employer may shut down, and if there are insufficient funds to meet the vested claims of the participants, *they have no recourse.*" II Leg. Hist. 1599 (emphasis added).

To remedy this situation, Congress chose not to void such exculpatory language in pension plans, which would have increased the risk of a direct cause of action against employers by participants. Rather, Congress created a statutory scheme independent of the fortuities of plan drafting.

Title IV of ERISA created a government corporation, the PBGC, § 4002, and charged it with the duty of "guarantee[ing] the payment of all nonforfeitable benefits . . . under the terms of the plan . . ." upon termination. § 4022(a). The measure of guarantee was derived from "nonforfeitable benefits . . . under the terms of the plan," but Congress imposed limitations on the guarantee to participants.[7] § 4022(b). Another provision, § 4062, entitles PBGC to a claim against employers, based on the value of PBGC's guarantee, but again there are statutory limitations, of which the most significant is that PBGC may not recover more than 30 percent of the employer's net worth. § 4062(b).

As Senator Williams stated in explaining the conference report on ERISA to his Senate colleagues, the Act accomplishes what both Houses had originally intended;[8]

[7] The guaranty is limited to "basic" benefits, subject to a maximum benefit payment, and generally reduced on a phased basis for benefits in force less than five years. § 4022(b).

[8] A plan termination insurance program had been included in each of the Pension Reform Bills that was reported in either the Senate or the House, except those of the House Ways & Means Committee, which expressly approved the insurance provisions of the House Labor Committee's bill. II Leg. Hist. 2619 and 3150.

And while a minority in the House Labor Committee (including Representative Erlenborn) urged in the Committee report that the

it guarantees vested pension rights against the possibility of loss upon plan termination:

> While the funding provisions are designed to assure that sufficient assets are available to a plan to pay benefits when due, experience has shown that participants and beneficiaries, even in well-funded plans, may lose vested rights when a plan terminates because of plant closure or other reasons.
>
> Accordingly, the conference substitute, as did the Senate and House bills, establishes an insurance program to protect employees against the loss of vested benefits in the event of plan termination.
>
> [III Leg. Hist. 4741]

We have set forth in Appendix A to this brief some of the major statements in the debates and in committee reports which show that Congress regarded the loss of vested pension benefits on termination to be, in the words of Senator Bentsen, "a great personal tragedy," III Leg. Hist. 4793, which Congress needed to remedy by the termination insurance program. But it bears special emphasis, because of the nature of petitioner's argument, that as the Court of Appeals observed, Congress so legislated cognizant "of the fact that the standard private pension plan prior to ERISA disclaimed employer liability." Op. 14-15.

The Court of Appeals cited Representative Annunzio [9]

insurance program be stricken from the bill, II Leg. Hist. 2387-2388, they did not press the issue on the House floor, but sought to alter certain elements of the program, in respects not pertinent here. III Leg. Hist. 3523-3526.

[9] I think it is unconscionable that an employer is presently under no legal obligation to make good on his pension promise. With the exception of collectively bargained plans, an employer can alter, modify, or terminate a pension plan at any time—and for any reason. Moreover, he generally reserves the right to suspend, reduce, or discontinue payments to the plan—whether

and Representative Erlenborn,[10] a member of the House Committee on Education and Labor. Op. 15, n. 14.

The Court of Appeals also quoted the Interim Report of the Senate Subcommittee on Labor:

> The need for or desirability of insurance arises because of the numerous contingencies which can result in . . . termination . . . . Employers ordinarily have no financial responsibility for pension payments beyond the contributions they are committed to make.[11]

or not previous payments have been sufficient to provide all benefits earned to date. In other words, Mr. Chairman, if the pension plan is terminated, the participants and beneficiaries can only look to the accumulated assets in the pension fund for the satisfaction of their claims. Simply stated, if the assets are insufficient, claims cannot be met in full. Is that any way to run a retirement program?

[II Leg. Hist. 3479]

[10] Termination insurance holds out the hope that everyone who participates in a pension plan will get the full pension that is offered to him or that has been promised to him. It has some hazards, however.

The only way that one can make termination insurance something other than a dumping ground for the obligations of the employer is to put some sort of obligation on the employer. At the present time the legal foundation of pension plans is that the employer sets up a pension trust and promises to make periodic contributions into that trust. If there are sufficient assets, the employee will get the pension that has been described; if there are not, he does not get it; he gets something less. But the employer up until the present time generally has not made a promise to pay the pension, only to make periodic contributions.

[II Leg. Hist. 3388]

Representative Erlenborn feared that changing the "basic legal obligation of the employer" would discourage the creation of new defined benefit pension plans, III Leg. Hist. 3389; see also the Supplemental Views of Representative Erlenborn and four others, II Leg. Hist. 2387-2388, quoted at Op. 18. Of course, the obligation to which he referred is the obligation to the PBGC, not to the plan.

[11] Op. 16, citing Interim Report of Activities of the Private Welfare and Pension Plan Study, Senate Committee on Labor and Public Welfare, Subcommittee on Labor, 92nd Cong., 2d Sess., 74 (1972).

The court also cited sources which informed Congress that pension plans sought to protect employers by limiting recourse for benefits to the pension fund and precluding claims against solvent employers; a celebrated example was Studebaker. Op. 15-16.

Consequently, the Court of Appeals properly concluded: "The purpose of Title IV was to guarantee benefits that might be lost because of employer liability disclaimers." Op. 14. Although neither petitioner, nor *amicus* Concord, disputes that proposition anywhere in their briefs, their legal theory cannot be reconciled with that Congressional purpose, and the statutory provisions which Congress enacted to accomplish it.

C. Nachman's Reading of § 4022 Makes That Section Totally and Irreconcilably Inconsistent With Other Provisions of Titles I, II, and IV.

It is clear that the participants whose benefits are at issue here have satisfied all the conditions required of them under the Nachman Plan and thus under the PBGC regulation.[12]

Indeed, Nachman concedes that "the benefits at issue provided by the Nachman Plan were, prior to the effec-

[12] Petitioner does assert that the benefits at issue are not "nonforfeitable" under PBGC's definition because, according to Nachman, they "are not payable under the terms of the Nachman Plan," Pet. Br. 18, n.42, referring to Art. V, § 3 thereof. Since this argument, if sound, would be decisive, its placement in the footnote betrays petitioner's recognition that the argument is belied by the terms of the plan itself. Art. V, § 3 says nothing about when benefits are "payable"; that is the office of Arts. VII & VIII. Art. VII, § 2 provides: "Benefits shall become payable at the times and for the periods hereinafter set forth in Art. VIII." A. 28. Art. VIII, §§ 1, 2 & 3 each state when particular types of benefits "shall become payable." A. 29. Art. V, § 3, by contrast does not use the term "payable"; it says that the benefits "provided for herein" (specifically by Arts. VII & VIII) shall be only such as can be provided by the assets of the fund. A. 24.

tive dates of Titles I and II of ERISA, vested in a contractual sense, so that an employee with seniority who terminated employment before age 65 might receive benefit payments." Pet. Br. 28.

Despite this concession, Nachman contends that "such vested benefits were not nonforfeitable since they were conditioned on full funding and were, in fact, not fully funded." Pet. Br. 28. As Nachman also states, its position is that those benefits were not "nonforfeitable" and are not insured by PBGC because "the benefits provided in the Nachman Plan were conditioned upon sufficiency of assets after termination." Pet. Br. 9. It is clear that this interpretation of § 4022(a) defeats the purpose of Title IV. That purpose, as we have seen, is to "guarantee that in the event their plan terminates with insufficient funds, their vested benefits would be paid . . . ." III Leg. Hist. 4752 (Senator Javits), see Appendix A, *infra.*

Consistent with this purpose § 4022(a) guarantees precisely those benefits which are "nonforfeitable . . . under the terms of a plan" (or "vested" as they were referred to in the Congressional deliberations). Congress wished to insure only benefits to which the participants are entitled even if their plan terminates without sufficient funds. Therefore, in order to determine what benefits are insured, *i.e.*, "nonforfeitable . . . under the terms of a plan," the PBGC looks to whether "on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required of him under the provisions of the plan to establish entitlement to the benefit . . . ." 29 C.F.R. 2605.6(a). Petitioner's contrary view, that the benefits here were forfeitable because they were conditioned upon sufficiency of assets upon termination, is wholly inconsistent with Congress' insurance program. It would render benefits "forfeitable" and thus not insurable, because of the oc-

currence of the very contingency against which the beneficiaries were to be protected by insurance.

Petitioner's interpretation of "nonforfeitable" likewise cannot be squared with another provision of Title IV, *i.e.*, § 4044. In that section, Congress clearly considered a benefit to be "nonforfeitable" even if there were not sufficient funds in the plan to pay that benefit in full.[13]

Section 4044 establishes six priority categories. The term "nonforfeitable" is actually used in § 4044(a)(5): "Fifth, to all other nonforfeitable benefits under the plan." Plainly, the benefits set forth in the four previous categories, §§ 4044(a)(1)-(4), were also considered to be "nonforfeitable." Section 4044(a)(6) states that the last order of priority is "all other [*i.e.*, 'forfeitable'] benefits under the plan." That Congress established an order of priorities for allocating plan assets among "nonforfeitable" benefits shows that Congress regarded benefits to be "nonforfeitable" for purposes of Title IV even if plan assets are insufficient to pay them.

Assets of a terminated plan are first allocated to benefits in Category 1. If there are more than sufficient assets to cover Category 1 benefits, assets are then allocated to benefits in Category 2. The same procedure is followed in succeeding categories. Thus, if there are not enough assets in a terminated plan to fund benefits completely through Category 5, there would be unfunded "nonforfeitable" benefits. These benefits, since they are "nonforfeitable," would be guaranteed by PBGC.

Nachman's position that benefits were not "nonforfeitable" because "the benefits provided in the Nachman Plan were conditioned upon sufficiency of assets after termination," Pet. Br. 9, is also completely at odds with the

[13] Section 4044 mandates the allocation of the assets with respect to guaranteed and non-guaranteed benefits; the guarantee protects benefits which are within § 4022(a), but which have not been paid by the plan under § 4044.

funding provisions of Titles I and II. Nachman concedes that the term "vested" admits to the contingency that payment may be impossible because of a lack of funds in the trust upon termination, but it is asserted that the term "nonforfeitable" admits of no such possibility. Pet. Br. 26-31. Only fully funded benefits, then, can be nonforfeitable. Thus, Nachman's vested benefits "were not nonforfeitable since they were conditioned on full funding . . . ." Pet. Br. 28. Such a reading of "nonforfeitable" would be contradictory to the meaning and structure of the pension rules contained in the Internal Revenue Code and similar provisions in Title I of ERISA.

In order to enjoy favorable treatment under the Internal Revenue Code, a plan must provide for nonforfeitability of the full benefit at normal retirement age. The Code also provides three alternative schedules to achieve nonforfeitability earlier, over the course of employment; a plan must contain provisions meeting or exceeding at least one of the three alternatives. I.R.C. § 411 (added by ERISA § 1012). Yet there is no indication that these rules are violated if the plan has total assets valued below the required vested benefits and thus, would be incapable upon termination of paying all vested benefits. Indeed, the detailed funding rules established by ERISA require funding of certain benefits over the course of as many as 40 years, without regard to the fact that the benefits might already be required by the vesting requirements to be nonforfeitable. And while it might be argued (consistent with Nachman's notion of "nonforfeitability") that full funding is not necessary until termination, there is no indication on the face of the Act or in the exhaustive Congressional discussion that there is a contribution "catch up" requirement when a plan terminates to assure full funding at that time.

In short, there is no logic in the coexistence of a "full funding" requirement for nonforfeitability under the vesting rules, Pet. Br. 28, and of separate funding rules. Congress could reasonably have chosen either, but not both. Acceptance of petitioner's position would mean that the detailed funding rules, carefully crafted to balance safety for participants with reasonable demands on plan sponsors, are superfluous. There is no need to reach a result so patently inconsistent with Congress' intent. The correct resolution, instead, is to recognize the fallacy of petitioner's reading of "non-forfeitability."

Further confirmation that Congress did not intend nonforfeitability to require "full funding" is found in the very creation of the Title IV insurance program, which is predicated on the reality that pension plans will sometimes be insufficiently funded on termination. If funds were sufficient, there would be no need for the guarantee. And the termination of plans with insufficient funds was, as already shown, the cause of the loss of benefits against which Congress sought to protect plan participants. To argue that such benefits are not "nonforfeitable" and therefore not insurable if the plan's assets are insufficient is, therefore, totally absurd.

D. Title IV Guarantees Became Effective Immediately Upon Enactment.

Congress gave careful consideration to the effective dates of the various provisions of ERISA. Title IV was no exception. The provisions of Title IV pertinent to this case came into effect on the date of enactment, September 2, 1974. § 4082(a). The Conference Committee reported:

> Probably one of the most difficult problems confronted by the conferees was the selection of effective dates for the insurance program, and here both Senate and House conferees worked diligently to arrange a structure of effective dates that would bring the insurance protection generally into effect as quickly as possible.
>
> [III Leg. Hist. 4766]

Congress took the unusual step of directing that PBGC pay benefits guaranteed under Title IV with respect to single-employer plans terminated even before that date, but after June 30, 1974, subject to certain conditions. § 4082(b). Representative Ullman and Senators Williams and Humphrey each stated that the "after June 30, 1974" date was chosen "to provide prompt and effective protection to the employees concerned." III Leg. Hist. 4678, 4742, 4781.

Congress' clear intent to provide guarantees and impose liability immediately on passage of ERISA is confirmed by the special provision to cushion the effect on employers of the concomitant liability. Congress authorized the PBGC for 270 days after the enactment of ERISA to "waive" or "reduce" employer liability [14] where "necessary to avoid unreasonable hardship in any case in which the employer was not able, as a practical matter, to continue the plan." § 4004(f)(4).

The statute and the legislative history are absolutely clear that PBGC "shall guarantee the payment of all

[14] The employer who sponsored a terminated plan is generally liable to PBGC for the difference between the value of the benefits guaranteed by PBGC and the value of plan assets at termination. However, PBGC's claim is limited to 30 percent of the net worth of the employer at (or within 120 days before) plan termination. § 4062(b).

nonforfeitable benefits" [15] and that program was effective on the date of enactment, *i.e.*, September 2, 1974. §§ 4022 (a), 4082(a).

Petitioner Nachman does not dispute these facts. *See* Pet. Br. 10, 14, and 15. Yet, as shown below, the consequence of accepting Nachman's position in this case would, as a practical matter, be the same as a delay in the effective date for the majority of pension plan participants Congress expressed anxiety to protect immediately.

As this Court observed in *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702, 721-722 n. 40 (1978), Congress "set a wide variety of effective dates for different provisions of" ERISA. Congress was particularly precise with respect to the impact of Title IV on plans which terminated on or about the September 2, 1974 date of enactment. As we have noted, it even empowered PBGC to guarantee benefits to employees under some plans which terminated in the two months prior to that date. § 4082(b). Benefits earned prior to enactment were to be insured. In reporting out S. 4 and H.R. 2, the respective Labor Committees said in identical words:

> The bill reported by the Committee requires plan termination insurance to cover unfunded vested liabilities incurred *prior to* as well as subsequent to enactment of the Act, in order to prevent employees from being deprived from insurance protection for retirement credits earned before enactment.[16]

Congress likewise took great pains in establishing the effective dates of the various provisions of Titles I and

[15] Section 4022(a). These benefits are subject to limitations not pertinent here. § 4022(b).

[16] I Leg. Hist. 610, II Leg. Hist. 2361, emphasis in Senate Report. See also the House Committee on Education and Labor's explanation of § 401 of H.R. 12906, II Leg. Hist. 3346.

II. (*See* Appendix B, *infra*, which sets forth Senator Javits' explanation of these Congressional determinations.)

Employer liability commenced on September 2, 1974. In attempting to escape liability, petitioner seizes on January 1, 1976, the effective date of the vesting standards in § 203 of Title I for Nachman's plan.[17] The real reason for that delay was to enable ongoing plans to "adjust" to the newer vesting standards.[18] By terminating its plan before January 1, 1976, Nachman never was required to comply with those standards. Nachman's liability results not from Titles I and II but from Title IV, and is governed by Title IV's effective date.[19] January 1, 1976 is not the date upon which Nachman's liability to PBGC turns; September 2, 1974 is the date from which Nachman's employees enjoyed the satisfaction of having a government guarantee backing up certain of the pension promises made to them and it is the date on which Nachman's contingent liability arose. It was no part of Congress' intent in delaying the effective date of the vesting standards to undercut the decision "to provide prompt and effective protection to the employees concerned." *See* p. 23, *supra*.

[17] For plans in existence on January 1, 1974, the vesting rules generally became effective on the first day of the first plan year beginning after December 31, 1975. § 211.

[18] III Leg. Hist. 4675.

[19] Nachman asserts that imposing employer liability before January 1, 1976, "would render this grace period meaningless and nonexistent." Pet. Br. 37. This is absolutely untrue. Benefits under plans, such as Nachman's, with less generous vesting provisions than mandated by § 203 were guaranteed only to the extent of nonforfeitable benefits under the plan and the employer's liability was accordingly smaller. Compare Art. VII, § 1(C)-(D), A. 28, with § 203(a)(1)(A)-(C).

E. PBGC's Regulation Correctly Interprets "Nonforfeitable" and Should be Followed.

Participants in the Nachman plan who have satisfied all of the plan's requirements for eligiblity are therefore eligible for Title IV's guarantee, despite plan language limiting recourse to assets at termination, under the PBGC regulation, 29 C.F.R. § 2605.6(a), which states in pertinent part:

> For the purposes of this part, a benefit payable with respect to a participant is considered to be nonforfeitable, if on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required of him under the provisions of the plan to establish entitlement to the benefit . . . .

The regulation was properly issued under authority of § 4002(b)(3), which empowers PBGC "[t]o adopt, amend, and repeal, by the board of directors, bylaws, rules, and regulations relating to the conduct of its business and the exercise of all other rights and powers granted to it by the Act." The regulation clarifies an essential component of the regulatory scheme. PBGC cannot guarantee the payment of nonforfeitable benefits without determining what those benefits are. It cannot, as directed by § 4061, pay the benefits guaranteed under § 4022(a) unless it first determines their amount. To do this PBGC must know what benefits § 4022(a) guarantees.[20]

[20] There is no merit to *amicus* Concord's claim, Concord Br. 27, that, as in *Chrysler Corp.* v. *Brown*, ——U.S. ——, 99 S.Ct. 1705, 1718 (April 18, 1979) (hereafter *Chrysler*), there is no "nexus" between PBGC's regulation and a grant of legislative authority by Congress. The purpose of the regulation is to provide a basis for the basic Title IV functions we have just described in the text, and "the width of administrative authority must be measured in part by the purposes for which it was conferred . . . ." *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968). Concord's attempt, Concord Br. 27-28, to equate PBGC's § 4002(b)(3) authority with the provision that this Court held in *Chrysler*, 99 S.Ct. at 1721-1725, did not authorize substantive rules cannot survive comparison of the relevant language. While the provisions dealt with in *Chrysler* and § 4002(b)(3) both contain language authorizing regulations limited to agency affairs, only § 4002(b)(3) adds broad authority to issue regulations for "the exercise of all other rights and powers granted to it by this Act." Since one of PBGC's principal powers is to "guarantee the payment of all nonforfeitable benefits . . ." under § 4022(a), PBGC clearly was authorized to promulgate regulations construing that section.

Petitioner contends that PBGC is foreclosed from promulgating its own definition of "nonforfeitable" for purposes of Title IV because that term is defined in Title I, § 3(19). That was the basis on which the District Court ruled in Nachman's favor. The Court of Appeals stated that the Title I definition should govern in Title IV, Op. 7, n.6, but reversed the lower court's holding on the grounds that the benefits at issue in this case were "nonforfeitable" under that definition.

We urge that this case be decided on the basis of the definition of "nonforfeitability" in PBGC's regulation rather than that of § 3(19) of the Act as construed by the Court of Appeals. We do so primarily because, with all respect to that court, PBGC's definition more precisely reflects the purpose of Congress in using that term in Title IV. Moreover, while in this case the same result properly follows under either definition, we are guided by Mr. Justice Jackson's caution that "sometimes the path that we are beating out by our travel is more important to the future wayfarer than the place in which we choose to lodge." [21] That the path which we have chosen is shorter is evident from the Court of Appeals' opinion, for in order to determine the meaning of the

[21] *First National Bank of Chicago* v. *United Airlines*, 342 U.S. 396, 398 (1952) (concurring opinion).

operative words in § 3(19), the court looked to the purpose and history of Title IV; PBGC's definition is based directly on that clear evidence of Congressional intent. PBGC's approach is also more consistent with the Congressional decision to divorce eligibility for insurance from the statutory vesting standards to which the § 3(19) definition of "nonforfeitability" is addressed. But above all, we fear that the path chosen by the Court of Appeals here could lead a court to deny benefits to participants whom Congress wanted to protect. While we cannot foresee all the difficulties the § 3(19) definition would create for the administration of Title IV, a clear warning signal is provided by a decision which the Court of Appeals, petitioner, and *amicus* Concord all discuss, *Riley* v. *MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977), *on remand*, 452 F. Supp. 117 (S.D.N.Y. 1978), *aff'd on other grounds*, 586 F.2d 968 (2d Cir. 1978).[22]

If the issue is approached on the basis of the statutory language rather than on maxims of statutory construction,[23] petitioner's contention that 3(19) should govern

[22] *Riley* v. *MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977), involved a provision in the MEBA pension plan which barred retirees from receiving benefits while working in the maritime industry. The Second Circuit held that by virtue of this provision, benefits under the MEBA plan were not "nonforfeitable" within the meaning of Section 3(19), because the receipt of the benefits was not "unconditional" and therefore not "enforceable against the plan." If that definition were carried over to Title IV, then PBGC could have guaranteed *no* benefits under the MEBA Plan if it had terminated in 1975 for, by the very existence of the rule against retirees working in the maritime industry, the benefits under the plan would have been conditional and thus not "nonforfeitable." So long as the plan was in operation, the only effect of this rule was to suspend the benefits of those individual retirees who violated the rule; the rule did not affect other participants at all. Denying PBGC's guarantee would be contrary to the objective of Title IV, which is to insure benefits which employees would have obtained but for termination.

[23] Because of the unusually heavy reliance on rules of construction throughout petitioner's brief and that of *amicus* Concord, it bears

Title IV is unpersuasive. Section 3 ("Definitions") is contained in Title I of the Act and is explicitly stated to be "For purposes of this title . . . ." Congress thereby made clear that the definitions contained in § 3 were to govern "this title," namely Title I. If Congress had intended these definitions to control throughout ERISA it would have written, "For purposes of this Act." The phrase "this Act" was used in the immediately preceding section.[24] That Congress did not intend the definitions of Title I to carry over automatically to other provisions of

mentioning that such rules only provide guidance to reasoned statutory interpretation, and not a substitute for it. Moreover, they generally contain their own limitations, or are controverted by opposing canons. As Professor Llewellyn wrote:

> When it comes to presenting a proposed statutory construction in court, there is an accepted conventional vocabulary. As in argument over points of case-law, the accepted convention still, unhappily, requires discussion as if only one single correct meaning could exist. Hence there are two opposing canons on almost every point. An arranged selection is appended. Every lawyer must be familiar with them all: they are still needed tools of argument. At least as early as Fortescue the general picture was clear, on this, to any eye which would see.
>
> Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon: The good sense of the situation and a *simple* construction of the available language to achieve that sense, *by tenable means, out of the statutory language.*

"Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed," 3 *Vand. L. Rev.* 395, 401 (1950) emphasis in original. (See also, the collection of canons of construction—in separate columns headed "Thrust" and "Parry"—*Id.* at 401-406.

[24] Section 2(b) begins, "It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, ..."

Section 2(c) begins, "It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries . . . ."

the Act is further evidenced by the fact that both Titles II and IV contain their own definition sections, § 1015 (which creates a new § 414 of the Internal Revenue Code) and § 4001, respectively.

Petitioner asserts that "[i]t would be intolerable to have different definitions of the important concept of nonforfeitable benefits for one title of ERISA than for another." Pet. Br. 20. It certainly would not be intolerable here, and this Court has rejected that dogmatic approach to statutory construction:

> It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the Legislature intended it should have in each instance."

Atlantic Cleaners & Dyers v. *United States*, 286 U.S. 427, 433 (1932).[25]

Title IV deals with different aspects of pension plan regulation than do Titles I and II, utilizing different procedures and employing a unique statutory process to achieve its ends without requiring changes in plan terms.

[25] *Kent Manufacturing Corp.* v. *Commissioner*, 288 F.2d 812 (4th Cir. 1961) (hereafter *Kent*), relied on by both courts below, is not to the contrary. The Fourth Circuit said only that "[a]n earlier specific definition *may* properly color a subsequent use of the same words without redefinition." *Id.* at 815 (emphasis added). The court did not say that it *must* color, let alone control, the meaning of the subsequent use. In *Kent* the legislative history of the provision at issue confirmed that the meaning set forth in the definition was intended to be applied. The PBGC opinion letters cited at Pet. Br. 19-20, n. 44 and Concord Br. 33, n. 17 are entirely consistent with both *Kent* and the PBGC's action in promulgating 29 C.F.R. § 2605.6(a). The letters implicitly recognize that definitions from other titles of the Act may be a useful guide in applying terms for Title IV purposes, absent countervailing considerations. But their clear import, read as a whole, is to address Title IV questions and to resolve them consistently with the mandate of that Title.

Although the bill which passed the House would have insured only benefits which plans were required to provide under the minimum vesting standards—*i.e.*, the standards contained in Titles I and II—the Conference Committee adopted the Senate version, which guaranteed benefits which are nonforfeitable under the terms of a plan without regard to those standards.[26]

In these circumstances, the initial inquiry about a PBGC regulation interpreting Title IV should be whether it carries out the purposes of that Title. Since PBGC's definition does carry out the purposes of Title IV, and any narrower definition would deny benefits which Congress intended to guarantee, PBGC's regulation should be approved. Moreover, PBGC's special responsibilities under Title IV bring into play the oft-stated proposition that "[t]he interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in construing the statute." *Miller* v. *Youakim*, 440 U.S. 125, 144 (1979), and cases there cited.

In the leading case on this point, Justice Cardozo wrote that this "practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in

[26] The argument that because the term "nonforfeitable" has the same meaning in Title II as in Title I, it must also have the same meaning in Title IV as in Title I, Pet. Br. 19, is unsound. It is true, as petitioner states, that the vesting rules in Titles I and II contain essentially identical language; the same is true of accrual and participation rules. The reason that the meaning of "nonforfeitable" is identical in Titles I and II is not that the Title I definition carries over to Title II by its own force, but that attributing to that term different meaning in Title II would be inconsistent with Congress' intent to establish uniform standards for compliance with Title I and tax-qualification under the Internal Revenue Code, as amended by Title II. *See* Reorg. Plan No. 4 of 1978, 3 C.F.R. 332 (1978 Compilation). There is no such intent to establish perfect congruence between Titles I and IV generally, or between the minimum vesting standards of § 203 and the benefits guaranteed in § 4022.

motion; of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U.S. 294, 315 (1933). The PBGC regulation in issue here is a classic example of "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion." [27]

F. Section 3(19), While Not Controlling, Is Nonetheless Consistent With the PBGC Regulation.

As we have noted, the Court of Appeals accepted petitioner's contention that the meaning of "nonforfeitable" in § 4022(a) is governed by the definition of that term in § 3(19). The Court of Appeals held that the benefits in issue here are "nonforfeitable" under that definition.

Petitioner disagrees with the Court of Appeals for two reasons: it asserts that the benefits were not "unconditional" because they were conditioned upon the sufficiency of assets in the fund to pay them, and that for the same reason the claim for the benefits is not "legally enforceable against the plan." Pet. Br. 22-25. Neither objection to the Court of Appeals' analysis is well taken.

[27] The interpretation of the statute at issue in the instant case is incorporated in the Guaranteed Benefits Regulation promulgated by the PBGC on September 22, 1975. This was the most important regulation issued by the PBGC to that date and remains central to its administration of Title IV. Accordingly, it received extraordinary attention within the PBGC, within the Federal establishment and from the private sector pension community.

Apart from the extensive work of PBGC staff, the regulation was reviewed before being published in the Federal Register as a proposed regulation (1) by the Presidentially appointed Advisory Committee to the PBGC at nine meetings over a period of four months, (2) by officials of the Department of Labor, and the Office of the Assistant Secretary of the Treasury for Policy and the Internal Revenue Service, and (3) by the Secretaries of Labor, Commerce, and the Treasury in their roles as the members of the PBGC's Board of Directors. In response to the publication of the proposed Guaranteed Benefits Regulation and the invitation to comment thereon, a number of comments were received. Those comments were carefully considered and, before the final regulation was promulgated, it was again reviewed (1) by the Advisory Committee to the PBGC, (2) by the staffs of the Labor and Treasury Departments and IRS, and (3) by the three Cabinet members who are PBGC's governing board.

With respect to the "unconditional" requirement the Court of Appeals reasoned:

> Nor is their claim against the plan conditional. All conditions place[d] upon the participant such as age and length of service have been met. The PBGC definition interprets "unconditional" only as referring to those conditions placed on the participant and not to sufficiency of assets. Satisfaction of the claim is dependent upon sufficient assets, but this should not be viewed as a condition on the claim. Under the pre-ERISA terminology, one author clarified that although benefit claims in fact were conditioned on the availability of funds in the trust, they were not to be considered conditional rights.

Op. 9 (footnote omitted).

Petitioner characterizes this result as illogical; it says, "[u]nconditional means unconditional," and then sets forth a dictionary definition of that word. Pet. Br. 23. But there is nothing illogical about giving statutory language a meaning which is less than absolute when, in the context of that legislation, it appears that the absolute was not intended. Far from being "illogical," it is, as Judge Learned Hand taught, "one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary." [28]

[28] *Cabell* v. *Markham*, 148 F.2d 737, 739 (2d Cir. 1945) *affirmed*, 326 U.S. 404 (1945). Petitioner cites one sentence from IRS regulation 1.411(a)-4 to bolster its contention that conditioning receipt of benefits on sufficiency of plan assets at termination is a forfeiture. Pet. Br. 17, n.41. The next sentence of that regulation states that "a plan does not violate the nonforfeitability requirements merely because in the event of a termination an employee

The Court of Appeals here properly looked to a noted authority in the pension field, Professor Dan M. McGill, to determine whether "unconditional", when used in the context of the vesting of pension benefits, excluded the condition of asset sufficiency. Without acknowledging the Court of Appeals' reliance on Professor McGill, petitioner objects that "no peculiarities 'of technical pension language' could lead to such an illogical result." Pet. Br. 23. It is entirely reasonable and proper for a court to give seemingly absolute language a more sensible meaning when, from the context and from general usage, it appears that the absolute could not have been intended.[29]

does not have any recourse towards satisfaction of his nonforfeitable benefits from other than the plan assets or the Pension Benefit Guaranty Corporation." Petitioner's interpretation, then, suggests inconsistency within the IRS regulation, and resolves the self-created conflict in favor of its own version of nonforfeitability. However, the language petitioner seizes upon can be read harmoniously with the regulation of which it is a part and with Title IV; that language would bar provisions that reduce rights to plan benefits to the level of assets at termination because such provisions could permit reversion to the employer of additional assets subsequently received by the plan.

[29] *Amicus* Concord argues that the Court of Appeals' reasoning "embodies a significant error of syntax because the fulcrum of its holding is its perception that the adjective 'unconditional' in § 1002 (19) [§ 3(19) of ERISA] modifies 'claim' rather than 'benefit'." Concord Br. 14. We suggest, however, that the error is on Concord's part. As Mr. Justice Harlan wrote for this Court, "insights derived from syntactical analysis form a hazardous basis for the explication of major legislative enactments." *Machinists* v. *Labor Board*, 362 U.S. 411, 417, n.7 (1960). Concord's argument gives point to the wisdom of this observation. Concord itself appears to be confused as to whether it is contending that the word "benefit" or the word "part" is modified by "unconditional" in § 3(19) and must be "legally enforceable." Compare the sentence in Concord's brief quoted above, with two ensuing paragraphs. Concord Br. 14-15. In any event, while we readily grant that 3(19) is not a model of draftsmanship, and thereby invites grammatical nitpicking, it is plain enough that the Court of Appeals' reading was correct, for, only a *claim* can be enforced; it makes little, if any sense, to speak of a benefit (or part of a benefit) as being "enforceable"; so too, it is a "claim" rather than a "benefit" which is (or is not) subject to a condition.

With respect to the other element of § 3(19) the court below correctly stated that:

> although the benefit claim is admittedly not legally enforceable against the employer under the terms of the plan, the statute requires only that the claim be enforceable against the *plan*. Nachman's employees' claims are enforceable against the plan, they simply may not be collectable." Op. 8-9 (emphasis in original).

Petitioner's argument to the contrary is without merit. Although it asserts that "enforceability is a term used in contract law," Pet. Br. 24, there is no authority cited for that proposition. It is plainly mistaken, since in a suit to enforce the contract the court examines whether the plaintiff establishes a breach and damages, not whether the defendant will have sufficient assets to permit the judgment to be collected.[30]

In support of its interpretation of § 3(19), petitioner refers to the use of the word "nonforfeitable" in three provisions of the 1954 Internal Revenue Code which were unchanged by ERISA. Pet. Br. 28-29, 11-12. Petitioner attempts to demonstrate that the term "nonforfeitable"

[30] Petitioner asserts that claims to benefits were not enforceable against the plan after termination under the allocation provisions of Art. X, § 3, Pet. Br. 24-25. Petitioner's unstated premise is that those plan provisions governed allocation of assets on termination of its plan. That is not so. From September 2, 1974 onwards, all pension plan assets must be allocated on termination in the priority order specified by § 4044(a). § 4044(a); see III Leg. Hist. 4642 (Conference Report on 93-406); I Leg. Hist. 1152-1153 (Senate Report 93-383 on S. 1179). The benefit to which a participant is entitled under the benefit formula of the plan is the starting point for applying the § 4044(a) rules. Thus, there is no reason to discuss the claimed effect at petitioner's plan termination of Art. X, § 3; it was a dead letter. In any event, allocation provisions go only to the handling of whatever assets the plan has at termination. That is a different matter than the issue in this case, which involves rights of employees against the plan. Those rights are no more affected by rules which govern the division of plan assets at termination than by the principal plan terms in issue here (Art. V, § 3), which limit recourse to the plan assets at termination.

as used before ERISA had the consistent and essential characteristic of permitting no condition with respect to the lack of funds to pay benefits. In fact the function of nonforfeitable as used in these Code provisions deals with the disposition of funds on termination. This is the very opposite of the question at hand, which is the impact of the concept of nonforfeitability in regard to a shortfall of funds at termination. Section 401(a)(7), the present Section 411(d)(3) of the Internal Revenue Code, requires that once an employer makes a contribution subject to preferential tax treatment, he cannot reacquire the funds by terminating the plan. Thus, accrued benefits, even if not vested, must become "nonforfeitable" upon termination to the extent funded. For practical purposes an employee's previously unvested rights would vest upon termination. Title IV of ERISA deals with an entirely different matter. It protects rights vested before termination, within statutory limits, despite lack of funds in the plan.

Likewise, I.R.C. § 401(d)(2) fails to support Nachman's position because it also addresses itself to an employee's right to that which is in the fund, rather than to benefits promised that are not funded.[31]

[31] Finally, Nachman turns to the fact that the regulations under I.R.C. § 402(b) refer to contributions which have been made, in defining the point when a contribution is nonforfeitable. Pet. Br. 28. The argument is that under this provision a contribution cannot be nonforfeitable until it is made; and therefore, Nachman concludes, a promised benefit cannot be nonforfeitable until a contribution is made. But the fault of the logic is apparent. There is nothing impossible with making a promise before a contribution, although it is clearly difficult to discuss the consequences of a contribution before it exists. The purpose of I.R.C. § 402(b) is to address the tax consequences to an employee regarding contributions by an employer to a nonexempt trust. Because it is a general principle of the tax law that a mere promise (vested or otherwise) does not give rise to income to a person on the cash method, the Code and regulation provisions address only the special case in which there has been a transfer of funds.

These usages of the term nonforfeitable occurred in the context of already transferred property; this context, however, should not be substituted for the meaning of the term so that tax law provisions discussing the tax consequence of unconditional rights are read to impose a requirement that all rights be unconditional.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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Appendices

APPENDIX A

The Legislative History and Purpose of ERISA

ERISA was the culmination of many years of effort in both Houses of Congress. In particular, the termination of Studebaker's pension plan in 1964, resulting in losses of pension benefits for thousands of long-term employees, dramatized the need for termination insurance. Congress responded with a ten-year effort that produced Title IV of ERISA in 1974.

The history of Title IV is complicated. Two committees in each House worked on the pension reform legislation. In the Senate, the Committee on Labor and Public Welfare (hereafter "the Senate Labor Committee") and the Committee on Finance worked on ERISA. In the House, the Committee on Education and Labor (hereafter "the House Labor Committee") and the Committee on Ways and Means worked on the Act.

In 1973, two major pension reform bills were introduced in the Senate. S. 4, the Williams-Javits Bill, was referred to the Senate Labor Committee. S. 1179 was referred to the Senate Finance Committee. The Senate Labor Committee reported out a revised version of S. 4 (I Leg. Hist. 389-586), discussed in S. Rep. No. 93-127 (I Leg. Hist. 587-665). The Senate Finance Committee reported out a revised version of S. 1179 (I Leg. Hist. 780-1062), discussed in S. Rep. No. 93-383 (I Leg. Hist. 1063-1224). The sponsors of S. 4 and S. 1179 agreed on a compromise bill which they offered as a substitute for S. 4 (I Leg. Hist. 1271-1497). On September 19, 1973, the Senate unanimously passed that substitute as an amendment to H.R. 4200, a minor House bill unrelated to pension reform (II Leg. Hist. 1883-2178).

In the House, two major pension reform bills were originally introduced. H.R. 2 and H.R. 462 were re-

ferred to the House Labor Committee which reported out a revised version of H.R. 2 (II Leg. Hist. 2181-2347), discussed in H. Rep. No. 93-533 (II Leg. Hist. 2348-2392).

The House Ways and Means Committee confined its consideration of pension reform to Internal Revenue Code amendments. On February 5, 1974, it reported out H.R. 12481, which had been introduced the previous day (II Leg. Hist. 2394-2583) and which is discussed in H. Rep. 93-779 (II Leg. Hist. 2584-2759). This bill was designed to complement H.R. 2.

A second set of complementary bills was then reported to the floor. The House Labor Committee presented H.R. 12906 (II Leg. Hist. 2761-2922), a revised version of H.R. 2 which is explained at II Leg. Hist. 3293-3350. The House Committee on Ways and Means reported out H.R. 12855 (II Leg. Hist. 2924-3114), discussed in H. Rep. No. 93-807 (II Leg. Hist. 3115-3292); H.R. 12855 was a slightly revised version of H.R. 12481. The two new bills were offered as amendments to H.R. 2. H.R. 12906 became Title I and H.R. 12855 became Title II of the new H.R. 2 (III Leg. Hist. 3898-4250). The House passed H.R. 2 on February 28, 1974.

H.R. 2 was sent to the Senate, which amended it by deleting the House language and substituting the exact language of H.R. 4200 (formerly S. 4). On March 4, 1974, the Senate passed the amended H.R. 2 (III Leg. Hist. 3599-3895).

A Committee of Conference adopted a substitute for both the House and Senate versions of H.R. 2. The revised bill and its accompanying report were submitted as H. Rep. No. 93-1280 (III Leg. Hist. 4277-4654). The bill was passed by both Houses (III Leg. Hist. 4656-4835), and was signed into law by President Ford on September 2, 1974 as P.L. 93-406, 88 Stat. 829 (III Leg. Hist. 4836-5043).

Congress established the pension plan termination insurance program to protect employees against the loss of vested benefits caused by termination of a pension plan with insufficient funds. The purpose of the pension plan termination insurance program was stated by Senator Williams, the Chairman of the Senate Labor Committee at the beginning of the debate on S. 4. Senator Williams spoke of the necessity for pension reform.

> If we are to insure that retirement benefits earned by and promised to our workers will really be given to them, then passage of such a measure is essential.
>
> This legislation, co-sponsored by 53 Members of the Senate is the product of the most comprehensive study of the private pension system ever undertaken by the Congress.
>
> This 3-year study was conducted by the Subcommittee on Labor pursuant to three successive resolutions of the Senate, and was undertaken to ascertain the need for statutory protections for workers' pension programs and to formulate appropriate corrective legislation.
>
> The provisions of S. 4 are designed to eliminate the deficiencies which our study identified in the existing private pension system.
>
> Its basic goal is to assure workers that they will receive the promised pension benefits earned for their retirement during their working lives.
>
> * * * *
>
> For too long and for too many workers, the promise of pension benefits upon retirement has been an illusion and indeed, a hoax.
>
> [II Leg. Hist. 1598-1599]

Senator Williams then discussed the loss of pension benefits due to insufficient funding at termination:

Another reason why so many employees have found their pension expectations to be illusory is that the employer may shut down, and if there are insufficient funds to meet the vested claims of the participants, they have no recourse.

A classic case, of course, is the shutdown of Studebaker operations in South Bend, Ind., in 1963, with the result that 4,000 workers lost 85 percent of their vested benefits because the plan had insufficient assets to pay its liabilities.

While this was a spectacularly tragic instance, it was by no means unique. Last year, for example, P. Ballantine and Son, a substantial contributor to a multiemployer plan, sold its operations and withdrew from the plan.

Because the plan did not have sufficient assets to cover vested liabilities, several hundred employees, with as many as 30 years service, will lose a substantial portion of their vested benefits.

These, of course, are by no means isolated cases. According to a recently-issued study by the Departments of Labor and Treasury, over 19,000 workers lost vested benefits last year because of the termination of insufficiently funded plans.

[II Leg. Hist. 1599-1600][1]

[1] In the section on plan termination insurance in the Senate Finance Committee report on S. 1179, the Labor-Treasury study was discussed under the heading "General Reasons for Change."

A joint study by the Treasury Department and the Department of Labor indicates that there were 683 plan terminations in the first seven months of 1972 that were reported to the Internal Revenue Service. These terminations resulted in the loss of benefits with a present value of some $20 million, by about 8,400 pension claimants (participants, retirees, and beneficiaries) in 293 of the terminated plans. The average loss of benefits for claimants amounted to $2,400. About $11 million of the total losses were suffered by 3,100 claimants who were retired, eligible for retirement, or vested in their benefits. Their losses averaged $3,600 per person.

On the average, retirees and beneficiaries lost 42 percent of the value of their current pensions, participants eligible for retirement lost 57 percent of the value of their benefits (one-tenth of them lost their entire benefits), participants who were fully vested but not yet eligible for retirement lost 65 percent of the value of the benefits (two-fifths of them lost their entire benefits), and former employees with deferred vested benefits lost 97 percent of the value of their benefits.

[I Leg. Hist. 1147, citing Department of the Treasury and department of Labor, Study of Pension Plan Terminations, 1972—Interim at 2, 18, 23]

An earlier study, Beier, "Terminations of Pension Plans: Eleven Years' Experience, "*Monthly Labor Review*, (July, 1967), at 26-30, was noted in the Interim Report of Activities of the Private Welfare and Pension Plan Study, Senate Committee on Labor and Public Welfare, Subcommittee on Labor, 92nd Cong., 2nd Sess., at 74 (1972). (The Court inadvertently gave the date of this report as 1971.)

In the House, Representative Dent, the Chairman of the General Subcommittee on Labor of the House Committee on Education and Labor, summarized the termination insurance provisions of H.R. 2:

> Defined benefit plans will be covered by insurance to protect participants against the loss of benefits on account of plan terminations prior to completion of the funding cycle.
>
> This provision will provide a back-up guarantee to every pension plan that, regardless of the economic fortunes of the companies sponsoring the plan, its obligations will be met.

[II Leg. Hist. 3375]

Representative Gaydos, member of the House Subcommittee on Labor, said, after describing the Labor-Treasury study:

These statistics indicate that while compared to the total number of employees covered by private pension plans those who experienced losses represented a very minor percentage, the fact remains that there were 8,500 persons who experienced losses who were either removed from the labor force by retirement or ready to retire or whose benefits were fully vested.

[II Leg. Hist. 3381]

Representative Annunzio said:

But the provision which I am most happy to see incorporated is the termination insurance program. As far as I am concerned, the termination insurance program will provide the backbone of confidence that our workers must have in the private pension system—just as we have confidence in the safety of our personal savings in financial institutions as a result of FDIC and FSLIC. Termination insurance will eliminate the legitimate fears of thousands of our workers that the pension plan which they so desperately depend on will not pay off at retirement. It will also put an end to the actual losses which have been experienced by about 20,000 workers a year who unfortunately find out that their pension plan is unilateraly terminated without sufficient assets to pay all benefits due.

[II Leg. Hist. 3479]

These views concerning the purpose of the termination insurance program were reiterated when the conference report (which was approved and enacted as ERISA) was brought to both Houses. For example, Representative Brademas, the representative from the South Bend, Indiana district in which the Studebaker plant was located, referred to the Studebaker closing and the findings of the Labor-Treasury terminations study, and concluded:

Mr. Speaker, over a decade ago the collapse of Studebaker and its pension fund taught us a painful lesson. If pension insurance had been available then, thousands of pensions would have been saved. Enactment of this comprehensive pension reform legislation which includes plan termination insurance is long overdue and I urge my colleagues to give H.R. 2 their full support.

[III Leg. Hist. 4694]

Representative Annunzio said:

The case for pension plan reform was made known by the thousands of workers who voiced their legitimate grievances to us, who told their stories before House and Senate hearings, and even on TV the people spoke, and we listened.

The pension reform bill will assure that those workers under private pension plans will get the benefits to which they are entitled—even if a company for which they worked goes out of business. I feel that the pension plan termination insurance program is the real backbone of the legislation. It will be the spine of the private pension system since it will assure workers that if they are entitled to a pension, they will get one.

As I have said in the past, in speaking for the inclusion of a termination insurance program, such a program would eliminate the legitimate fears shared by thousands of workers that the pension on which they so desperately depended would not pay off at retirement. No longer will actual losses be experienced by thousands of workers each year who have found that their pension plan was terminated without sufficient assets to pay all benefits due.

[III Leg. Hist. 4698-4699]

In describing the conference report to his Senate colleagues Senator Williams said:

> While the funding provisions are designed to assure that sufficient assets are available to a plan to pay benefits when due, experience has shown that participants and beneficiaries, even in well-funded plans, may lose vested rights when a plan terminates because of plant closure or other reasons.
>
> Accordingly, the conference substitute, as did the Senate and House bills, establishes an insurance program to protect employees against the loss of vested benefits in the event of plan termination.
>
> [III Leg. Hist. 4741]

Senator Bentsen, the sponsor of S. 1179 and the member of the Senate Finance Committee most responsible for ERISA stated:

> There is a clear need to legislate minimum funding standards so that pension plans are accumulating sufficient assets to meet their obligations. It is also essential for all pension plans to acquire termination insurance to guarantee payment of vested benefits in the event that a plan happens to terminate with insufficient assets to meet its obligations. This bill sets minimum funding standards and establishes a termination insurance program.
>
> * * * *
>
> We must not forget that the termination of a retirement plan is much more than a statistic compiled for Government charts. It is much more than a list of numbers or a series of percentages. As the victims of pension plan terminations can easily attest, a termination represents a great personal tragedy.
>
> [III Leg. Hist. 4793][2]

[2] See also Senator Bentsen's earlier statements concerning the need for termination insurance [I Leg. Hist. 213-214 and II Leg. Hist. 1635-1636].

And Senator Javits, who had first introduced a pension reform bill (which included a plan termination insurance program) in 1967, and who was, with Senator Williams, co-author of S. 4, summarized the termination insurance provision of ERISA in these terms.

> Employees would have the right to government insurance of their pension benefits—similar to FDIC insurance of bank deposits—which would guarantee that in the event their plan terminates with insufficient funds, their vested pension benefits would be paid up to a maximum limit of $750 monthly—but not to exceed 100 percent of their compensation over their highest 5 years.
>
> [III Leg. Hist. 4752]

APPENDIX B

ERISA Effective Dates

Each part of Title I (and of the substantive provisions of Title II) contains a separate section establishing the effective date (or dates) of that part; and even within each part, there are significant differences. The conference report discusses these provisions in meticulous detail. (See III Leg. Hist. 4533-4534 (participation and investing); 4560-4561 (funding); 4592-4593 (fiduciary responsibility); 4647-4649 (termination insurance).) Senator Javits' summary and the various effective dates of the Act (III Leg. Hist. 4762-4764) is set out below.

> Effective dates: First. Reporting and disclosure—The conference agreement provides that the reporting and disclosure provisions generally are to take effect on January 1, 1975. However, in the case of a fiscal year plan which begins before January 1, 1975, and ends after December 31, 1974, the Secretary of Labor may by regulation postpone the effective date until the beginning of the first plan year of the plan which begins after January 1, 1975.
>
> Second. Participation and vesting—changes made in the bill with respect to participation and vesting are to apply to new plans in plan years beginning after the date of enactment. For plans in existence on January 1, 1974, the general effective date of these provisions is to be plan years beginning after December 31, 1975.
>
> The general effective date of plan years beginning after December 31, 1975, applies in the case of collective bargained plans in the same manner as in the case of other plans. However, in order that the opening up of the contract to comply with the requirements of this bill will not require negotiations

> with respect to other matters, the conference agreement provides that a collective-bargaining contract, in existence on January 1, 1974, which does not expire until after the general effective date for existing plans, may be reopened solely for the purpose of allowing the plan to meet—or exceed—the minimum requirements of this act, without having to be opened for any other purpose.
>
> Finally, the conference substitute provides that if a plan, adopted pursuant to a collective-bargaining agreement in effect on January 1, 1974 contains a clause: First, which provides supplementary benefits which are in the form of a lifetime annuity and refer to not more than one-third of the basic benefit to which the employees generally are entitled; or second, which provides that a 25-year service employee is to be treated as a 30-year service employee, if that right is granted by a contractual agreement which is based on medical evidence as to the effects of working in an adverse environment for an extended period of time—such as workers in foundries or workers in asbestos plants—then the application of the accrued benefit provision of this bill to those benefits is to be delayed until the expiration of the collective-bargaining agreement—but no later than plan years beginning after December 31, 1980.
>
> Third. Funding—Under the conference agreement, in the case of new plans, the funding provisions are to apply to the first full plan year beginning after the date of enactment of the bill. Generally, in the case of plans existing on January 1, 1974, the new funding provisions are to become applicable for plan years beginning after December 31, 1975. In the case of collectively bargained plans—both single employer and multiemployer plans—existing on January 1, 1974, the effective date would be delayed

until the termination of the contract existing on January 1, 1974, but not later than plan years beginning after December 31, 1980.

Fourth. Fiduciary Responsibility—Under the conference agreement, generally, the new fiduciary responsibility rules are to take effect on January 1, 1975. However, with respect to any plan which is covered by plan termination insurance and which terminates before January 1, 1975, the fiduciary rules are to take effect on the date of enactment of the bill.

Under the labor provisions, the Secretary of Labor may postpone until January 1, 1976, the effective date with respect to the requirements for establishing a plan and establishing a trust, the rules regarding liability for breach by a cofiduciary—other than the rules allowing delegation of asset management functions to an investment manager—and the rules prohibiting exculpatory clauses.

The conference agreement also provides transition rules for situations where employee benefit plans are now engaging in activities which do not violate current law, but would be prohibited transactions under the substitute.

One of the transition rules permits the leasing or joint use of property involving a plan and a party in interest under a binding contract in effect on July 1, 1974 (or pursuant to renewals of the contract), to continue for 10 years beyond that date until June 30, 1984. A similar 10-year transition rule applies to loans or other extensions of credit under a binding contract in effect on July 1, 1974 (and renewals thereof), where the loan remains as favorable as an arm's-length transaction with an

unrelated party and is not prohibited under present law.

The conference agreement allows a plan to sell property, at arm's-length terms, to a party in interest where the property is now under a lease or joint use which qualifies for the 10-year transition rule described above. Sales of this type must occur before July 1, 1984. This transition rule is provided because it appears that such leases are not uncommon and in such cases often a party in interest is the best available buyer.

The conference agreement allows certain fiduciaries to provide multiple services to a plan until June 30, 1977, if he ordinarily and customarily furnishes services on June 30, 1974. Under this provision, such a fiduciary would not be limited to providing those services to plans which he served on that date but he could take on new customers after that date. Under the conference agreement, multiple services also can be provided until June 30, 1977, if they were being provided under a binding contract in effect on July 1, 1974—or under renewals of such a contract.

The conference agreement permits a plan to dispose of excess employer securities or employer real property owned by the plan on June 30, 1974, and at all times thereafter to a party in interest if the holding of such property would violate the rules governing holding of employer securities and real property, and if the sale, and so forth, is at fair market value.

Fifth. Individual Retirement Accounts—The deduction for retirement savings is to be available for taxable years beginning after December 31, 1974.

Sixth. Contributions for the self-employed—In general, the amendments with respect to H.R. 10 plans are to apply to taxable years beginning after December 31, 1973. The rule with respect to the $100,000 contribution base limitation is to apply to taxable years beginning after December 31, 1975, or, if earlier, the first year in which contributions under the plan exceed the deductible contribution limits of present law. The rules facilitating the use of defined benefit plans for the self-employed are to apply to taxable years beginning after December 31, 1975. The rules with respect to excess contributions are to apply to contributions made in taxable years beginning after December 31, 1975, and the rules with respect to premature distributors are to apply to distributions made in taxable years beginning after December 31, 1975. The rule permitting withdrawal of voluntary contributions by owner-employees is to apply to taxable years ending after the date of enactment.

Seventh. Plan termination insurance.—Under the conference agreement, benefits payable by single-employer plans are insured with respect to plans terminated after June 30, 1974. Employers do not, however, incur contingent liability coverage for plans terminating between June 30, 1974, and the date of enactment.

With respect to multiemployer plans, benefits generally are not covered for plans terminating before January 1, 1978. However, the corporation may, in its discretion, cover the benefits of multiemployer plans that had been maintained for five years prior to a termination after the date of enactment, if the Corporation determines that this coverage will not jeopardize the coverage of multiemployer plans terminating after December 31, 1977, and the Corporation may in its discretion cover the benefits for certain nonqualified multiemployer plans before January 1, 1978, if they meet certain specified standards.

Premiums for contingent employer liability insurance arranged by the Corporation may be collected within 3 years of date of enactment. Coverage under such contingent liability insurance will commence after 5 years payment of premiums.

FOR ARGUMENT

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NACHMAN CORPORATION,

Petitioner,

v.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER NACHMAN CORPORATION

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INTRODUCTION

The briefs of the respondents and General Motors Corporation ("GM"),[1] as amicus curiae, are based on a misconceived and myopic view of ERISA, on tortured grammatical discourse, and on a neglectful approach to the facts of this case.

Respondents, especially the PBGC, rely primarily on legislative history to the near exclusion of the language

[1] Unless otherwise indicated, this Reply Brief will employ the same acronyms and abbreviations used in the main Brief of petitioner.

of the statute itself. Although an examination of the congressional intent may be important in construing any statute, the inquiry should focus principally on the legislative scheme reflected in the final version of the Act, rather than on isolated committee or floor debates. *S&E Contractors* v. *United States,* 406 U.S. 1, 13 n.9 (1972)[2] Especially in the case of a statute as comprehensive as ERISA, which defines many of its critical terms and specifies its purposes, the legislative intent is clearly discernible from the face of the law.

That intent was to govern private pension plans by providing and funding certain mandatory minimum benefits ultimately to be insured by the PBGC. Just as Congress clearly intended thereby to increase the economic burden on employers, it intended to provide certain grace periods, which this court has recognized in two recent decisions.[3] The result sought by respondents and imposed by the court of appeals, however, would destroy the very balance sought by Congress in enacting ERISA, and would impose substantial retroactive liability despite the clear statutory language designed to avoid such an effect. The decision appealed from should be reversed.

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[2] In language equally applicable to the instant case, Mr. Justice Douglas in *S&E Contractors* noted that the legislative history of the Act there in question "has something for everyone." *Id.* See also, *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384, 394 (1951) (Jackson, J., concurring: "Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports. . . .")

[3] *Allied Structural Steel Co.* v. *Spannaus,* 438 U.S. 234, 249 (1978); *City of Los Angeles Dep. of Water* v. *Manhart,* 435 U.S. 702, 721 (1978). See also, *Malone* v. *White Motor Corporation,* ...... U.S. ...... (No. 79-349, October 15, 1979), summarily affirming 545 F.2d 599 (8th Cir. 1978).

ARGUMENT

I.

RESPONDENTS MISCONTRUE THE RELEVANT PROVISIONS OF ERISA AND THE NATURE OF THE REMEDIES SOUGHT BY NACHMAN.

A.

The Benefits at Issue Were Not Nonforfeitable Since They Were Conditioned Upon Sufficient Assets at Termination and Were Not Enforceable Against Nachman or the Plan.

PBGC guarantees only "nonforfeitable benefits . . . under the terms of the plan." (ERISA § 4022(a); 29 U.S.C. § 1322(a)) Upon termination of a plan, employers are liable to the PBGC only for such guaranteed benefits. (ERISA § 4062(b); 29 U.S.C. § 1362(b)) Thus, the central issue in this case is whether the benefits at issue are "nonforfeitable," a term defined by section 3(19) of ERISA, 29 U.S.C. § 1002(19)):[4]

> "The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan."

In their attempt to demonstrate how a benefit which is expressly conditioned upon sufficient plan assets remaining at termination can be labeled "unconditional" and "legally enforceable against the plan," respondents misconstrue the

---

[4] Because the question of the validity of or deference to be afforded to the PBGC's own definition of nonforfeitable has been addressed at some length both by the parties (Nachman Brief pp. 18-21; UAW Brief pp. 11-14; PBGC Brief pp. 26-32) and the *amici* (Concord Control Brief pp. 24-34; GM Brief p. 21), Nachman will not readdress that subject in this Reply Brief, but will rely on the argument contained in its main brief and the amicus brief of Concord Control, Inc.

facts[5] and engage in grammatical gymnastics which defy comprehension. The syntactic exercise on page 15 of the UAW brief illustrates the futility of attempting to justify the court of appeals' conclusion that "unconditional" and "legally enforceable" modify the word "claim" rather than "benefit," and that the "claims" to benefits under the Nachman Plan were nonforfeitable despite the conditions imposed upon the receipt of benefits by the terms of the Plan. The UAW, and the court of appeals, conclude: "the question, then, is whether the *claim* is unconditional and enforceable against the Plan, *not* whether the benefit is so. The *claims* here clearly meet this test." (UAW Brief p. 15.) Similarly, the PBGC (at p. 34, n. 29) states:

> ". . . while we readily grant that 3(19) is not a model for draftsmanship, and thereby invites grammatical nitpicking, it is plain enough that the Court of Appeals' reading was correct, for, only a *claim* can be enforced; it makes little, if any sense, to speak of the benefit (or part of the benefit) as being 'enforceable'; so too, it is a 'claim' rather than a 'benefit' which is (or is not) subject to a condition."

This reasoning is fallacious for several important reasons. First, section 4022(a) of ERISA (29 U.S.C. § 1322(a)) provides that the PBGC insures nonforfeitable "benefits," not "claims." If the *benefit* is conditional or unenforceable, the PBGC does not insure it and the employer is not liable for its continued funding under ERISA § 4062(b). Second, section 3(19) defines "[t]he term 'nonforeitable' when used with respect to a pension *benefit* or right . . ." (emphasis added), an obvious reference to the rights insured by the PBGC.

Finally, the reasoning of the respondents and the court of appeals defies the ordinary meaning of the language employed by Congress. Indeed, both the UAW (at p. 16) and the

[5] Respondents' failure to address all the relevant terms of the Plan is discussed *infra*, at pp. 10-12.

PBGC (at p. 34) concede that something other than ordinary meaning of the words in question must be imposed for respondents to prevail. Perhaps this is the emergence of the "pension language" which respondents would have this Court devise. In any event, respondents have failed to set forth any convincing reason for doing such violence to the English language.

Under the statutory definition, therefore, the Nachman Plan benefits at issue, which were expressly conditioned on sufficient funding, were not "nonforfeitable," the PBGC was not required to insure them, and Nachman is not liable to the PBGC for the continued funding of the Plan which terminated prior to 1976, the date on which Nachman would have been required to provide a nonforfeitable benefit and undertake its funding. On this ground alone, the decision of the court of appeals should be reversed.

B.

This Court Should Reject the Respondents' Contention That the Various Titles of ERISA Should Be Viewed in a Vacuum.

In an attempt to divorce the liabilities imposed by Title IV from the grace periods provided by Titles I and II of ERISA, the respondents would have this Court construe each of these titles in a vacuum. For example, the PBGC premises much of its argument on the proposition that Titles I and II, which require plans to provide and fund nonforfeitable benefits, apply only to ongoing plans, while Title IV alone governs plans which did not continue past 1975. (PBGC Brief pp. 11-13.) Not only does this proposition ignore the general rule of statutory construction to view a statute as a whole[6] and the genesis of ERISA itself (discussed at Nachman Brief pp. 29-31), but it is simply incorrect. Titles I and II contain a number of requirements for plans regardless whether they were terminated prior to

[6] *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974).

1976.[7] Moreover, the PBGC clearly insures benefits compelled under the new minimum vesting requirements of Titles I and II which took effect in 1976. (ERISA §§ 203(a), 29 U.S.C. §§ 1053(a), 1061(a)(2); IRC §§ 411(a)(2), 412(b)(3).)

The PBGC also argues (at p. 31) that because the House bill would have insured only the benefits required to have been nonforfeitable under the ERISA vesting schedules, and the final bill insured nonforfeitable benefits under the terms of a plan, Congress did not intend "to establish perfect congruence between Titles I and IV generally, or between the minimum vesting standards of § 203 and the benefits guaranteed in § 4022 [29 U.S.C. § 1322]." (PBGC Brief, p. 31 n. 26.) This argument is specious because the final version of ERISA merely provides insurance for *all* the nonforfeitable benefits under the vesting schedule contained in a plan, which schedule may be more generous than the *minimum* required by the statute. The PBGC, therefore, erroneously concludes that by departing from the language of the House bill Congress intended to insure benefits which were never promised, or required to be promised, by the plan.

Clearly, Congress intended to provide a cohesive statutory structure governing all pension plans in existence on the date of enactment of ERISA, September 2, 1974. The several titles of the statute logically and intentionally relate to each other and should not be viewed in a vacuum.

[7] Indeed, the PBGC has taken the position that I.R.C. § 414(b), a provision of Title II, governs the liability of controlled groups for insolvent subsidiaries whose plans terminated before 1976. *PBGC v. Ouimet Corp.*, 470 F.Supp. 945 (D. Mass 1979). Further, the fiduciary duties, reporting and filing requirements of Title I (ERISA §§ 101-111) apply to all plans regardless of whether they were terminated.

C.

Respondents' Position Would Result in the Defeat of the Grace Periods Provided by Congress in Enacting ERISA.

Remarkably, neither the respondents nor GM addresses this Court's statements in *Allied Structural Steel Co. v. Spannaus, supra,* and *City of Los Angeles Dep. v. Manhart, supra,* which recognize the strong congressional intent to avoid the constitutional difficulties of imposing retroactively substantial economic burdens on employers. Although the court of appeals conceded that its interpretations of ERISA had just such a retroactive effect (Appendix to Petition p. 24), respondents would prefer to avoid discussing retroactivity under the guise of this Court's grant of certiorari limited to the interpretive issue. Only by interpreting the statute to avoid a retroactive effect, however, may the constitutional question be avoided.

In so attempting to evade this issue, respondents have failed to explain how the clear congressional intent to provide grace periods before plans were required to promise and fund nonforfeitable benefits can be honored by imposing liability immediately on employers such as Nachman, who terminated plans which *never* promised nonforfeitable benefits. Further, in arguing that Title IV imposed such liability by effecting the termination insurance provisions upon enactment, respondents fail to explain the fact that under ERISA § 4022(a), the PBGC was to insure, and employers were to be liable for only "nonforfeitable benefits . . . under the terms of the plan" —terms which were not required to be changed until 1976. There are no such explanations.

The PBGC's confusion over the fact that Title IV insurance became effective upon enactment in 1974 ignores the congressional intent to guarantee truly nonforfeitable benefits under plans which provided such benefits prior to 1976, the date they were required to do so. As discussed at pp. 14-15, *infra*, the PBGC properly provided some $20

million in insurance benefits for such plans which terminated during the grace period. Participants in those plans were thus provided an administrative structure from which to receive their promised benefits. When such plans terminated with insufficient funds, Congress put the burden of collecting the deficiency from the employer on the PBGC, rather than on the employees.

Preservation of the integrity of the congressional intent to insure only benefits promised or required to be promised under the terms of a plan compels reversal of the court of appeals' decision.

D.

The Amicus Brief of General Motors Is Based on the Incorrect Proposition That a Ruling in Nachman's Favor Would Necessarily Invalidate All Limitation of Employee Recourse Against the Employer After 1976.

GM's purported concern about this case is premised on the proposition that a holding by this Court for Nachman would necessarily compel a collateral holding that Titles I and II of ERISA preclude, after 1975, an employer from limiting in any way employees' recourse to plan assets at termination for benefits which exceed the benefits guaranteed by the PBGC. This proposition is not only incorrect, it attempts to pose a question that is not before this Court in the instant case.

The controversy between Nachman and the PBGC and UAW involves only the issue of whether, *before* the Plan was required to promise a nonforfeitable benefit, Nachman could terminate the Plan and be governed by its terms with respect to any obligations of continued funding. This case does not involve the validity of the various types of limitation of liability clauses, such as GM's, for plans which continued in existence after 1975. Although, by requiring that certain benefits become nonforfeitable, Titles I and II prevent the blanket type of liability clauses (like the one in

the Nachman Plan) which were permitted prior to 1976, the facts of this case and the numerous lower court decisions in cases similar to it do not present the issue of what type of limitation of liability clauses are allowable after that date.

In fact, the Internal Revenue Service has promulgated final regulations governing the very issue GM raises, agreeing with the position asserted by Nachman. The Internal Revenue Service concludes that a benefit which is conditioned upon sufficient plan assets on termination is not nonforfeitable:

> "Rights which are conditioned upon sufficiency of plan assets in the event of termination or partial termination are considered to be forfeitable because of such condition." I.R.C. Reg. § 1.411(a)-4(a), 26 C.F.R. § 1.411(a)(4).

Nevertheless, under the Internal Revenue Service regulation, a plan is expressly permitted to limit recourse to plan assets to the extent of PBGC coverage:

> "However, a plan does not violate the nonforfeitable requirements merely because of in the event of a termination an employee does not have any recourse towards satisfaction of his nonforfeitable benefits from any other than the plan assets or the Pension Benefit Guaranty Corporation." *Id.*

GM's position is, therefore, inaccurate and contradicted by the IRS regulations governing employer liability clauses. At most, GM's argument is premature and irrelevant to the instant case.[8]

[8] GM also argues (at p. 11) that it might be exposed to considerable liability because ERISA § 4022(b)(3) (29 U.S.C. § 1322(b)(3)) places limits on the amount of PBGC insurance. Adjusted to recent increases in the cost of living, the maximum benefit insured by the PBGC is now $1,159.09 per month. This limit is more than ten times the $110 average monthly benefit currently being paid by the PBGC. PBGC News Release No. 80-3 (11/26/79), CCH Pension and Profit Sharing Guide ¶ 22,284. Of course, the benefits at issue in the Nachman plan are limited to $105 per month (Article II, as

II.

RESPONDENTS HAVE IGNORED OR MISSTATED THE MATERIAL FACTS OF THIS CASE.

A.

Respondents Have Ignored Critical Provisions of the Nachman Plan.

Much of the rationale of the respondents, their *amicus* and the court of appeals is premised upon a misconception of Nachman's position and the terms of the Plan. This misconception is illustrated by the following statement from the PBGC's brief (at p. 13):

> "Instead of focusing on plan terms which measure the claims participants had against the plan, Nachman asserts that plan terms which limit the liability of the employer are dispositive. It was to provide protection for employees notwithstanding those limitation of liability clauses that Congress enacted Title IV."

See also, UAW at p. 5.

As set forth in Nachman's main Brief, the PBGC would prefer to view the concept of nonforfeitability solely from the position of whether the employee had fulfilled all conditions required of him at plan termination, and ignore other conditions placed upon the benefits at issue. The respondents also, as illustrated above, argue that Article V, § 3 of the Plan (set forth on p. 5 of Nachman's Brief), which conditions payment of benefits on sufficiency of assets at Plan termination and precludes employer liability for any further contributions,

amended, App. 14-17, 46-52), well within the insurable amount. The congressional limitation on PBGC exposure—like the limitation of employer exposure to 30% of net worth and the delayed effective dates of the minimum vesting and funding requirements—reflects the balancing of employer and employee interests which permeates the legislative scheme underlying ERISA. The fact that the maximum insurance appears to be sufficient to protect all but the highest paid participants demonstrates the wisdom of that legislative scheme, and the irrelevance of GM's argument.

does not prevent the benefits from being "nonforfeitable" since, under the statutory definition of section 3(19), the benefits or claims are purportedly "unconditional" and "legally enforceable against the *plan*." These benefits, respondents argue, are merely "uncollectible" against the *employer*.

Respondents' reasoning is fallacious since it ignores those provisions of the Plan which allowed the Plan to be terminated by either party upon certain conditions which were met in the instant case, which allowed amendments to comply with changes in the law, but which expressly provided that no such amendments could affect, either to increase or to decrease, the amount of contributions to the Plan.[9] These provisions demonstrate the clear intent of the employees as well as Nachman to seek benefits only from the assets of the Plan at termination, and to condition any recovery on the sufficiency of assets to the various categories of benefits contained in the Plan.

The court of appeals' opinion and respondents' arguments, except for a passing footnote reference by the PBGC, also ignore Article X of the Plan, which governs termination. (App. 32-33; discussed at Nachman Brief pp. 24-25.) Section 3 of that Article specifically provides that the Board of Administration of the Plan shall allocate funds to the various categories of benefits (based on employee age and seniority) only to the extent such funds exist at termination. If benefits for a given category are not fully funded, they are distributed pro rata only "to the extent that [the assets] shall be sufficient." Thus, Article X demonstrates that the unfunded

[9] Articles VII, § 5 (App. 23), Article IX, § 1(b) (App. 31), and Article X, §§ 1, 2 (App. 31, 52).

benefits were unenforceable against the *Plan*, as well as against the employer.[10]

When viewed as a whole, as it must be, the agreement between Nachman and the UAW, as expressed in the Plan, evidences no intention to provide nonforfeitable benefits in excess of plan funds, for no such promise was ever made. The PBGC, therefore, did not insure, and Nachman cannot be liable for, the payment of such benefits.

B.

Respondents Misstate the Nature of the Contractual Agreement Establishing the Plan at Issue.

Respondents would have this Court believe that Nachman unilaterally promised illusory pension benefits to its employees. Much of their argument appeals to the Court's sense of fairness in preventing the loss of "expected" benefits.

This reasoning is most startling coming from the UAW, which intervened in this action precisely because, as the union representing Nachman's employees, it is "a party and

[10] The PBGC attempts to meet this issue, by asserting (at p. 35, n. 30) that Article X, § 3 "was a dead letter" immediately upon enactment of ERISA, since section 4044(a) of Title IV (29 U.S.C. § 1344(a)) governed allocation of assets upon termination. The PBGC is wrong. Article X of the Plan is not inconsistent with section 4044(a). Section 4044 provides for the allocation of plan assets upon termination generally: first, to pay benefits already in pay status; second, to pay benefits which would have been in pay status had a participant retired prior to plan termination; and finally, to pay all other nonforfeitable benefits. The purpose of this provision is to ensure that plan assets are used first to pay benefits for which the PBGC otherwise would be liable.

Allocation of plan assets in accordance with Article X of the Nachman Plan results in the same priority of payments as section 4044 mandates. The Plan merely divides allocation categories by age, which is expressly authorized by the regulations. 29 C.F.R. § 2608.4. Moreover, the provisions of Article X allocating insufficient assets pro rata within a given category is expressly mandated by ERISA section 4044(b)(2).

Thus, Article X of the Plan complies with, rather than violates, the sections of ERISA which became effective upon enactment, and compels the conclusion that the benefits at issue were not, and were never intended to be enforceable against the *plan* on the date of termination.

signatory" to the Nachman Plan.[11] Since Nachman's employees—and their expectations—must be viewed through their collective bargaining agent, the contention of unfairness sounded by the UAW and its recent bargaining partner, General Motors, is indeed curious.

The benefits at issue were the result of collective bargaining by parties of equal strength for a package of wage and non-wage benefits. While the employer is most concerned with the total cost of such a package, it is the union which makes the primary decision concerning the mixture of wages and other non-wage compensation such as pension benefits. To the extent Congress intended to impose a minimum level of pension benefits for employees, its actions thus reflected a disappointment with the performance of the unions representing the employees at least as much as with the employers. In any event, by providing the grace periods which govern the disposition of this case, Congress recognized the balance which had to be drawn in fairness to both employer and employee.[12] It is that very balance which Nachman requests this Court to honor by reversing the decision below which imposes a substantial retroactive burden on the employer.

[11] Memorandum opinion of District Court granting UAW petition to intervene. App. 63.

[12] Thus, as the Senate Labor and Public Welfare Committee stated, delayed effective dates were provided to allow time for pension plans "to adjust to the new vesting and funding standards, to make provisions for additional costs which may be experienced, and to permit negotiated agreements to transpire." S. Rep. No. 93-127, 93d Cong., 1st Sess. 22 (1973).

C.

Respondents Incorrectly Imply that All or Nearly All Plans Which Terminated Prior to 1976 Contain Clauses Limiting Benefits to Plan Assets at Termination.

Respondents argue that the provisions of Title IV which provided termination insurance upon enactment of ERISA would be rendered meaningless by adoption of the district court's and Nachman's position that the terms of the Nachman Plan allow termination prior to 1976 without further employer liability. This position is based upon the assertion that such terms were "standard" and almost universal in private pension plans prior to the enactment of ERISA. (See PBGC Brief p. 16, UAW Brief p. 9-10.)

That assertion of fact is contradicted, however, by the PBGC's own affidavit filed in the district court (App. 70-74), which states that 43% of the 136 plans which terminated between September 2, 1974 and January 1, 1976 contained no limitation of liability provisions such as those at issue in the instant case. The PBGC as required by ERISA, insured the benefits provided by those plans since those benefits—as contrasted with those provided by the Nachman Plan—were indeed "nonforfeitable . . . under the terms of the plan." (ERISA § 4022(a); 29 U.S.C. 1322(a))

Thus, according to the PBGC's own affidavit, it provided almost $20 million in pension insurance of nonforfeitable benefits between the dates of enactment of ERISA and the effective date of the minimum funding and vesting requirements of Titles I and II. This can hardly be described as "a minuscule class of cases" (UAW Brief p. 10), or an emasculated or meaningless mandate to the PBGC. The very facts which the PBGC brought before the district court in this case, therefore, demonstrate the wisdom and purpose behind the grace periods provided by Congress simultaneously with the immediate institution of PBGC termination insurance program.

Respondents also argue that Nachman's position renders the system meaningless during the grace period since that position results in the PBGC's insuring and paying benefits for which the employer is already contractually liable. This argument ignores two important aspects of the legislative scheme: (1) in the event the employer who promised nonforfeitable benefits was insolvent or in financial distress, the employees, during the grace period, had recourse to the PBGC; and (2) even where the employer was solvent, Title IV provided an accessible, inexpensive method for individual participants to collect their promised benefits if the plan terminated with insufficient funds without having to sue their employer or experience delay in collecting their retirement income—that task was left to the PBGC.

CONCLUSION

The Congressional purpose should be given effect by this Court in reversing the decision of the court of appeals and holding that Nachman is not liable for continued funding, and the PBGC is not liable to insure, the benefits at issue in this case.

Respectfully submitted,
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 78-1557

NACHMAN CORPORATION,
Petitioner,
v.

PENSION BENEFIT GUARANTY CORPORATION

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF GENERAL MOTORS CORPORATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS AND BRIEF *AMICUS CURIAE* OF GENERAL MOTORS CORPORATION IN SUPPORT OF THE RESPONDENTS

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MOTION OF GENERAL MOTORS CORPORATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

To the Honorable Chief Justice and Associate Justices of the United States:

General Motors Corporation respectfully moves this Court, pursuant to Supreme Court Rule 42(3), for leave to file the accompanying brief in this case as *amicus curiae* in support of the Respondents and urging affirmance of the decision of the Court of Appeals for the Seventh Circuit. In support of this motion, General Motors shows as follows:

1. This motion is necessitated by the refusal of the Petitioner to consent to the filing of a brief by General Motors Corporation (General Motors) as *amicus curiae.*

2. General Motors, a Delaware corporation with its principal offices located in Detroit, Michigan, is engaged in the automotive manufacturing industry. General Motors sponsors defined benefit pension plans for employees of its United States operations. These plans have approximately 841,000 participants. The present value of the liability accrued under these plans for benefits which are nonforfeitable without regard to plan termination, an amount well in excess of guaranteed benefits, is approximately $12,098,000,000. This amount exceeds the value of plan assets. The present value of all accrued benefits which would become nonforfeitable on plan termination and which General Motors could become contractually liable to pay is approximately $16,120,000,000.

3. Prior to the enactment of the Employee Retirement Income Security Act of 1974 (ERISA), each of these plans contained a provision limiting the liability of General Motors under the plans to the

obligation to make the contributions specified in the plan documents. Upon the enactment of ERISA, these plans were duly amended to modify this limitation of liability provision to the extent required by Title IV of ERISA. However, the limitation of liability provisions remain in effect, as so modified.

4. Fundamental to the Petitioner's case is the proposition that sponsoring employer limitation of liability clauses which prevent participants from recovering unfunded benefits from the employers, themselves, in some way render benefits "forfeitable." Because the concept of nonforfeitability is used both in Title I of ERISA as well as in Title IV, Court determination that employer limitation of liability clauses render benefits forfeitable would result in provisions such as those contained in General Motors' plans being proscribed by Title I of ERISA. Such a holding is of no concern to Petitioner, or *amicus curiae*, Concord Control, Inc., because they terminated their plans prior to the effective date of ERISA's minimum vesting standard provisions. Such a determination, however, would be of vital concern to General Motors as well as to the thousands of other sponsoring employers who have chosen to continue their plans under the assumption that their limitation of liability provisions remain valid so long as they are consistent with potential PBGC recoverability.

5. No employer who has elected to continue to maintain its plans is involved as a party to this case. Consequently, the adverse impact that a ruling in Petitioner's favor would have upon such employers will not be presented to this Court unless our request to file the accompanying brief is granted.

WHEREFORE, it is respectfully moved and requested that General Motors Corporation be granted leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF *AMICUS CURIAE* OF GENERAL MOTORS CORPORATION IN SUPPORT OF THE RESPONDENTS

General Motors Corporation (General Motors) hereby submits this brief in Case No. 78-1557 urging

affirmance of the decision of the United States Court of Appeals for the Seventh Circuit entered in this case on January 23, 1979.

INTEREST OF *AMICUS CURIAE*

A statement describing the interest of General Motors as a sponsoring employer of a continuing pension plan is set forth in the preceding motion requesting leave to file this brief *amicus curiae.*

SUMMARY OF ARGUMENT

Critical to the resolution of this case is the question of whether a plan provision which purports to limit a participant's claim for benefits to the assets of a defined benefit plan renders otherwise nonforfeitable or vested benefits forfeitable.

Because the minimum vesting standards of Title I of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1381 (Supp. V 1975) (hereinafter "ERISA") require that certain benefits be nonforfeitable, a holding that such employer limitation of liability clauses render benefits forfeitable would require all plans which currently contain such clauses to remove them to avoid a violation of Title I.

Removal of limitation of liability clauses would expose employers who currently maintain plans to a potential contractual liability for benefits limited only by the assets of those employers. Such an extreme result would be contrary to the intentions of Congress in enacting ERISA.

ARGUMENT

I. Introduction.

Petitioner, Nachman Corporation, is an Illinois corporation which, pursuant to a collective bargaining agreement with Respondent, International Union, United Automobile Aerospace and Agricultural Implement Workers of America, established and maintained a pension plan for eligible bargaining unit employees (hereinafter referred to as the "Plan"). Pursuant to this Plan, Petitioner, as the Plan's sponsoring employer, agreed to make certain contributions to a trust fund which financed the Plan's retirement benefits. Petitioner retained the right to terminate the Plan upon 90 days' notice after expiration of the aforementioned collective bargaining agreement. The Plan contained a provision limiting the liability of Petitioner in the event of a Plan termination to any contributions which were accrued, but unpaid, as of the Plan termination date.[1]

ERISA was enacted by Congress in 1974. Title IV of ERISA, entitled "Plan Termination Insurance," created the Pension Benefit Guaranty Corporation (hereinafter "PBGC") for the purpose of insuring or guaranteeing certain "nonforfeitable" employee retirement benefits.[2] This insurance was to be funded by premiums paid by pension plan administrators,[3] as well as by the right of the PBGC to recover up to thirty percent of a sponsoring employer's net worth

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[1] Article V, § 3 of the Plan, Appendix 24.

[2] ERISA § 4022, 29 U.S.C. § 1322 (Supp. V 1975).

[3] ERISA § 4007, 29 U.S.C. § 1307 (Supp. V 1975).

for payments made by the PBGC due to the termination of the sponsoring employer's pension plan without sufficient plan assets to pay all guaranteed benefits.[4] Title IV of ERISA became effective, generally, on September 2, 1974.[5]

Petitioner announced on October 1, 1975 that it was terminating its Plan on December 31, 1975. At the time the Plan terminated certain benefits which were fully vested under the Plan, in that the participants had satisfied the Plan's service and age requirements, were not yet fully funded. The instant action was brought by Petitioner in order to challenge the PBGC interpretation of Title IV that under the foregoing facts the PBGC guarantees the Plan's vested, but unfunded, benefits. Petitioner claims that because the participants had no recourse against it for unfunded benefits due to the limitation of liability clause, the unfunded benefits were not "nonforfeitable" and, thus, not guaranteed under § 4022(a) of ERISA, 29 U.S.C. § 1322(a) (Supp. V 1975).

The district court accepted Petitioner's assertion that because the minimum vesting standards provision of ERISA [6] never became applicable to the Plan, the limitation of liability provision was valid and rendered the benefits in question forfeitable. The district court, therefore, granted Petitioner's motion for summary judgment and denied those of the Respondents. The district court rationale implies, therefore, that

[4] ERISA § 4062(b), 29 U.S.C. § 1362(b) (Supp. V 1975).

[5] ERISA § 4082, 29 U.S.C. § 1381 (Supp. V 1975).

[6] ERISA § 203, 29 U.S.C. § 1053(a) (Supp. V 1975); I.R.C. § 411.

the limitation of liability provision would be rendered void subsequent to the effective date of the minimum vesting standard provisions of ERISA. The Seventh Circuit, in reversing the district court, held that because Title IV became effective in 1974, prior to the termination of the Plan, its benefit guarantee and employer liability provisions [7] superseded the Plan's provision for absolute exclusion of the sponsoring employer's liability for unfunded benefits. It further held that benefits are not rendered forfeitable or not "nonforfeitable" as that term is used in the benefit guarantee and minimum vesting provisions of ERISA,[8] merely because they are not collectible from the sponsoring employer. Thus, the Seventh Circuit determined that the benefits in question were nonforfeitable with respect to the Plan and, reversed the holding of the district court. The case is currently on review pursuant to the Court's issue of a writ of certiorari.

II. A Determination by This Court that Provisions Which Limit Benefit Claims to Plan Assets Thereby Render Those Benefits Forfeitable, Would Expose Employers Maintaining Plans After January 1, 1976 to Substantial Potential Liability.

A critical issue in this case is whether or not a provision which limits a participant's claim for benefits to the assets of a defined benefit plan renders otherwise nonforfeitable benefits forfeitable. The Nachman Plan expressly provided that:

[7] ERISA §§ 4022 and 4062, 29 U.S.C. §§ 1322 and 1362 (Supp. V 1975), respectively.

[8] ERISA §§ 4022 and 203, 29 U.S.C. §§ 1362 and 1053; I.R.C. § 411.

> Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. In the event of termination of th[e] Plan, there shall be no liability or obligation on the part of the Company to make any further contribution to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid.

Article V, § 3 of the Plan, Appendix 24.

If because of this provision, no benefits under the Plan are viewed as being vested, the Petitioner has no liability to the PBGC. Pursuant to ERISA Section 4022, 29 U.S.C. § 1322 (Supp. V 1975), only certain nonforfeitable benefits are guaranteed by the PBGC. The liability imposed by Title IV of ERISA upon an employer who terminates its plan is limited to the lesser of the current value of unfunded benefits which are guaranteed under Title IV or thirty percent of the employer's net worth. ERISA Section 4062(b), 29 U.S.C. § 1362(b) (Supp. V 1975). Thus, it is clear that benefits which are forfeitable on the date of a Plan's termination cannot cause Title IV liability to attach to an employer. If, as was the case prior to the enactment of ERISA, an employer could create a plan which provided for no nonforfeitable benefits, Title IV would neither impose liability on the employer nor protect the plan participants. Congress foreclosed such an evasion of the regulatory scheme of Title IV by enacting minimum vesting, participation and benefit accrual standards under Titles I and II. ERISA §§ 202-204, 29 U.S.C. §§ 1052-1054 (Supp. V 1975); I.R.C. §§ 410-411. These minimum standards did not become effective

until plan years beginning after December 31, 1975,[9] while the plan termination insurance provisions of Title IV became effective upon the enactment of ERISA on September 2, 1974, with certain protection being afforded to plan participants retroactively to July 1, 1974.[10] During this interim period, if a plan which did not meet the minimum vesting standards established by ERISA terminated,[11] the protection of the participants and liability of the employer were limited to benefits vested under the terms of the plan.

Once Titles I and II of ERISA became effective, plans which continued in force were required to amend their provisions to bring them in compliance with ERISA's minimum standards. The minimum vesting standards under ERISA require, with certain enumerated exceptions,[12] every pension plan to pro-

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[9] ERISA § 211, 29 U.S.C. § 1061 (Supp. V 1975).

[10] ERISA § 4082, 29 U.S.C. § 1381 (Supp. V 1975).

[11] The Nachman Plan, for example, does not comply with the minimum vesting standards under ERISA in that a participant under that plan was not entitled to a deferred vested benefit until he had completed fifteen years of service. Article VII, § 3 at Appendix 28. This vesting schedule does not meet any one of the three alternative minimum schedules set forth in ERISA Section 203(a)(2), 29 U.S.C. § 1053(a)(2) (Supp. V 1975); I.R.C. § 411(a)(2).

[12] Permitted forfeitures include forfeiture upon death of a participant, suspension of payment of benefits during a period in time in which the participant is reemployed, changes in benefits resulting from retroactively effective plan amendment otherwise in accord with the statutes, and benefits forfeited by participants who withdraw mandatory contributions prior to the time they are fifty percent vested

vide that an employee's right to a retirement benefit be nonforfeitable upon the attainment of normal retirement age and upon completion of a specified number of years of service which does not exceed one of three permissible vesting schedules set forth in the statute. Thus, for example, a plan which previously provided that a participant had no right to receive a vested benefit prior to his completion of fifteen years of service and attainment of age 45 would not be in compliance with Section 203 and would be required to be amended to provide, say, that a participant's right to a benefit became nonforfeitable upon his completion of ten years of service. ERISA § 203(a)(2), 29 U.S.C. § 1053(a)(2) (Supp V 1975). A holding by this Court that the provision of the Nachman Plan which limits a participant's claim for benefits to the assets of the Plan thereby renders an otherwise nonforfeitable benefit forfeitable, would require all employers which currently maintain plans to eliminate such provisions from their plans because such provisions would be inconsistent with ERISA's minimum vesting standards. The defined benefit plans of many employers, including General Motors, currently contain such provisions.[13]

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in their accrued benefits. ERISA Section 203(a)(3), 29 U.S.C. § 1053(a)(3) (Supp. V 1975); I.R.C. § 411(a)(3).

[13] For example, Article V, Section 3(b) of the General Motors Hourly-Rate Employes Pension Plan provides:

> The pension benefits and supplements of the Plan shall be only such as can be provided by the assets of the pension fund or by any insured fund and there shall be no liability or obligation on the part of the Corporation to make any further contributions to the trustee or insurance company in event of termination of the Plan.

Provisions which expressly limit the benefit claims of participants to the assets of a defined benefit plan are included in order to foreclose creation of a contractual right under which employees could assert a claim against their employer for the payment of retirement benefits which are neither funded nor guaranteed by the Pension Benefit Guaranty Corporation. The modern judicial trend, evidenced by decisions throughout the United States, is that employers who create employee retirement, insurance or other welfare benefit plans, and communicate those plans to their employees, have made an offer which employees are deemed to have accepted through their continued rendering of services to the employer. Employee acceptance of this offer is held to create an enforceable unilateral contract.

Hoefel v. *Atlas Tack Corp.*, 581 F.2d 1 (1st Cir. 1978), *cert. denied sub nom., Atlas Tack* v. *Mahoney,* 440 U.S. 913 (1979), is a recent decision reflecting this judicial approach. In *Hoefel*, former employees brought an action to collect pension benefits allegedly due them from their previous employer. The employer, Atlas, had created a pension plan calling for it to make certain contributions. Atlas reserved the right to alter or terminate the plan, but it neither limited its liability upon plan termination to contributions already made nor expressly told its employees that discontinuance of the plan could cut off

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> No liability for the payment of pension benefits or supplements under the Plan shall be imposed upon the Corporation, the Officers, Directors or Stockholders of the Corporation, except as otherwise may be required by the Employee Retirement Income Security Act of 1974.

pensions already earned. Subsequently, due to financial difficulties, Atlas did terminate the plan and ceased making pension payments to the plaintiffs. The district court concluded both that plaintiffs had reasonably believed that upon qualifying under the plan, they would receive a lifetime pension, and that they had continued to render services to Atlas in reliance upon this promise of such a pension. Consequently, the court determined that Atlas' offer of a pension created binding unilateral contractual rights when employees, such as plaintiffs, qualified for a pension by rendering the requisite years of service. The district court, thus, issued a judgment for the plaintiffs which was later affirmed by the First Circuit. This Court denied certiorari.[14]

[14] Many other decisions hold that employer creation and communication of employee benefit plans constitute an offer which employees accept through their continued services, and whose acceptance gives rise to a contractual right to the benefit. *See, e.g., Matter of Erie Lackawanna Ry. Co.* 548 F.2d 621 (6th Cir. 1977); *Rochester Corporation* v. *Rochester,* 450 F.2d 621 (4th Cir. 1971); *Hurd* v. *Illinois Bell Telephone Company,* 234 F.2d 942 (7th Cir. 1956); *Hurd* v. *Hutnick,* 419 F. Supp. 630 (D.N.J. 1976); *Miller* v. *Dictaphone Corporation,* 334 F.Supp. 840 (D.Ore. 1971); *Hunter* v. *Sparling,* 87 Cal. App. 2d 711, 197 P.2d 807 (1948); *Tilbert* v. *Eagle Lock Co.,* 116 Conn. 357, 165 A. 205 (1933); *Delaware Trust Co.* v. *Delaware Trust Co.,* 43 Del. Ch. 186, 222 A.2d 320 (1966); *Ehrle* v. *Bank Building & Equipment Corp. of America,* 530 S.W.2d 482 (Mo. Ct. App. 1975); *Psutka* v. *Michigan Alkali,* 274 Mich. 318, 264 N.W. 385 (1936); *Stopford* v. *Boonton Molding Company,* 56 N.J. 169, 265 A.2d 657 (1970); *Sheehy* v. *Seilon, Inc.,* 10 Ohio St. 2d 242, 227 N.E.2d 229 (1967); *McHorse* v. *Portland General Electric Company,* 268 Or. 357, 521 P.2d 315 (1974); *Levitt* v. *Billy Penn Corporation,* 219 Pa. Super. Ct. 499, 283 A.2d 873 (1971); *Weesner* v. *Electric Power Board of Chattanooga,* 48 Tenn. App. 178, 344 S.W.2d 766 (1961); *Auerbach's Inc.* v. *Kimball,* 572 P.2d 376 (Utah 1977); *Schlosser* v. *Allis-Chalmers Corp.,* 86 Wis.2d 226, 271 N.W.2d 879 (1978); and *Parsley* v. *Wyoming Automative Company,* 395 P.2d 291 (Wyo. 1964).

To prevent an unlimited contractual liability from arising, employers have expressly limited their offer of retirement benefits to those benefits which can be provided from the assets of the plan and to those which are guaranteed by the Pension Benefit Guaranty Corporation. Requiring the excision of such provisions from retirement plans could result in substantially increased employer liability on plan termination. Indeed, in many instances this liability could exceed the thirty percent of net worth limitation which Congress placed on the Pension Benefit Guaranty Corporation's right to seek reimbursement from an employer terminating its plan. This increased liability arises because all benefits vested under a terminated plan are not guaranteed by the Pension Benefit Guaranty Corporation. It fully guarantees only nonforfeitable benefits (other than benefits becoming nonforfeitable solely by reason of plan termination) which have been in effect for five years, and do not exceed a specified dollar amount.[15] Benefit increases occurring within five years of plan ter-

[15] ERISA Section 4022(b)(3), 29 U.S.C. § 1322(b)(3) (Supp. V 1975), provides that guaranteed benefits may not exceed the smaller of a participant's average monthly gross income from his employer during the five consecutive calendar year periods in which such income was the highest or $750 adjusted for increases in a contribution and benefit base under the Social Security Act occurring since 1974.

mination become guaranteed at the rate of twenty percent of the increase, or if greater, $20 for each year in which the benefit increase has been in effect. Most significantly, Internal Revenue Code Section 411(d)(3) requires that a qualified plan provide that the rights of all affected participants to receive their accrued benefits become nonforfeitable upon the plan's termination or partial termination. Thus, all benefits of all participants in a terminated plan are nonforfeitable, but only a portion of these benefits are guaranteed by the Pension Benefit Guaranty Corporation. If clauses which limit a participant's claim to benefits to the assets of a plan are required to be deleted, employers will have a potential contractual liability for these nonguaranteed but nonforeitable benefits. The magnitude of this potential liability is substantial. For example, under General Motors plans, the present value of the accrued liability for benefits which are nonforfeitable without regard to plan termination, an amount greater than the value of guaranteed benefits, is approximately $12,098,000,000. This exceeds the value of plan assets. The present value of accrued benefits which are currently forfeitable but which would become nonforfeitable on plan termination and which General Motors could become contractually liable to pay is approximately $16,120,000,000.

The problems which would flow from a construction of ERISA under which an employer limitation of liability clause was viewed as impairing the nonforfeitability of benefits was apparently perceived by the Treasury Department in promulgating regulation Section 1.411(a)-4(a); 26 C.F.R. § 1.411(a)-4(a). This regulation provides in relevant part:

> Rights which are conditioned upon a sufficiency of plan assets in the event of a termination or partial termination are considered to be forfeitable because of such condition. *However, a plan does not violate the nonforfeitability requirements merely because in the event of a termination an employee does not have any recourse toward satisfaction of his nonforfeitable benefits from other than the plan assets or the Pension Benefit Guaranty Corporation.* (Emphasis added.)

The first sentence can be interpreted as merely proscribing a limitation of liability provision which does not acknowledge the recourse to the PBGC which plan participants now have for satisfaction of their nonforfeitable benefits. Thus, the second sentence appears to embrace the view urged here that an employer limitation of liability provision does not cause an otherwise nonforfeitable benefit to become forfeitable. If, on the other hand, the regulation is attempting to distinguish a condtioning of benefits on the sufficiency of plan assets from a limiting of the recourse of plan participants for payment of those benefits to plan assets, it is elevating form over substance and is internally inconsistent. In practice, the form of an employer limitation of liability provision matters not one wit. The effect of either type of provision on plan participants is the same—their claim for benefits may be satisfied only from the assets of the plan and the guarantees of the Pension Benefit Guaranty Corporation.

III. An Interpretation of ERISA Creating Unlimited Sponsoring Employer Liability Would Be Contrary To Congressional Intent.

Congress fully recognized that the American retirement system is largely comprised of private pension programs voluntarily created and maintained by sponsoring employers as a benefit for their employees. While Congress, through required vesting schedules, funding requirements and benefit guarantees sought, on the one hand, to insure that participants would actually receive the benefits upon which they relied, it recognized, on the other hand, that imposition of excessively onerous burdens upon sponsoring employers, as a matter of economic reality, would operate both to discourage creation of new plans as well as to encourage the termination of existing plans. This congressional intention not to undermine the viability of the private pension system is underscored by the following statement of Representative Ullman, now Chairman of the House Ways and Means Committee during debate on the Conference Report:

> I want to emphasize that these new [ERISA] requirements have been carefully designed to provide adequate protection for employees and at the same time, provide a favorable setting for the growth and development of private pension plans. It is axiomatic to anyone who has worked for any time in this area that pension plans cannot be expected to develop if costs are made overly burdensome, particularly for employers who generally foot most of the bill. This would be self-defeating and would be unfavorable rather than helpful to the employees for whose benefit this legislation [ERISA] is designed.

ERISA Leg. Hist., Vol. III at 4673. *Accord*, ERISA Leg. Hist., Vol. I at 599-600, S. Rep. No. 92-127, S. Comm. on Labor and Public Welfare Report on S. 4, and ERISA Leg. Hist., Vol. II at 1776, containing a comment of Senator Williams during early Senate debate on the proposed legislation. All citations to ERISA legislative history shall be to the separately bound legislative history: S. Comm. on Labor and Public Welfare, Subcomm. on Labor, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974 (Three Volumes) (1976) [hereinafter cited as "ERISA Leg. Hist."]

Similarly, during Senate debate on the Conference Report, Senator Nelson discussed the delicate balance Congress struck between employer and employee interests when enacting ERISA:

> In all its deliberations and decisions, Congress was acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, in the case of those requirements which add to the cost of financing pension plans, Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping costs within reasonable limits for employers.

ERISA Leg.Hist., Vol. III at 4800.

Further congressional concern that excessively stringent pension plan requirements would retard the

the growth of the private pension system is evidenced by the following analysis by the Senate Committee on Finance regarding the need to balance employer costs with desired reform:

> At the same time, the committee is aware that under our voluntary pension system, the cost of financing pension plans is an important factor in determining whether any particular retirement plan will be adopted and in determining the benefit levels if a plan is adopted, and that unduly large increases in costs could impede the growth and improvement of the private retirement system. For this reason, in the case of those requirements which add to the cost of financing retirement plans, the committee has sought to adopt provisions which strike a balance between providing meaningful reform and keeping costs within reasonable limits.

ERISA Leg. Hist., Vol. I at 1086, S. Rep. No. 93-383 on S. 1179. *Accord,* ERISA Leg. Hist., Vol. II at 2348, House Committee on Education and Labor Report on H.R. 2.

Any construction of ERISA which results in the imposition of unlimited employer liability flies in the face of this congressional concern and the structure of the statute. Indeed in areas where Congress decided to impose liability, it did so in a measured and limited manner. This is illustrated by the following analysis which is contained in both the Senate and House reports:

> Having determined that participation in the plan termination insurance program was essential for all plans, and that some degree of employer liability was necessary, the question of the degree of such liability becomes important. The Committee has concern that if the degree of liability was absolute to the extent of the employer's assets, it might drive some employers to the brink of bankruptcy, impose substantial economic hardship, or discourage the establishment of plans or the reasonable liberalization of benefits.
>
> Accordingly, the Committee endorsed a formula of employer liability which requires the employer to reimburse the plan termination insurance program for the total amount of insurance paid, but in no event greater than 50% of employer's net worth at time of plan termination.[16]

ERISA Leg. Hist., Vol. I at 612, S. Rep. No. 93-127: Report of Committee on Labor and Public Welfare on S. 4; ERISA Leg. Hist., Vol. II at 2363, H. Rep. No. 93-533, House Committee on Education and Labor Report on H.R. 2.

Ultimately, congressional deliberations and concern regarding the continued viability of the nation's voluntary, private pension system and the impact unlimited employer liability would have thereon, cul-

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[16] Congressional apprehension regarding the level of employer liability is further reflected by its ultimate enactment of the thirty percent of net worth ceiling prescribed by ERISA § 4062(b), 29 U.S.C. § 1362(b) (Supp. V 1975). The thirty percent figure was adopted after conferees from both houses received the following recommendation from the administration:

> The Administration recommends that employer liability be limited to 30 percent of an employer's net worth (determined as fair market value on a going concern basis) 120 days prior to the date of plan termination.

ERISA Leg. Hist., Vol. III at 5096.

minated in the enactment of ERISA § 4062(b), 29 U.S.C. § 1362(b) (Supp. V 1975), the limitation of employer liability provision:

> Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of—
>
> (1) the excess of—
>
> (A) the current value of the plan's benefits guaranteed under this title on the date of termination over
>
> (B) the current value of the plan's assets allocable to such benefits on the date of termination, or
>
> (2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

This limitation of liability provision represents a microcosm of Congress' profound efforts to balance the sometimes competing efforts of employer and employee because it is a product not only of legislative efforts to *limit* employer liability, but also of legislative desires to *create* employer liability. This latter objective arose from congressional fear that omission of a provision creating employer liability could operate to encourage employers to terminate pension plans in order to transfer their liability to the PBGC. ERISA Leg. Hist., Vol. II at 1724, Analysis of Amendment 496 to S. 4; and ERISA Leg. Hist., Vol. II at 2363, *supra* at 17. Consideration of both of these dimensions of congressional concern was well

articulated in the following statement of Representative Erlenborn during House debate on H.R. 2:

> The only way that one can make termination insurance something other than a dumping ground for the obligations of the employer is to put some sort of obligation on the employer. At the present time the legal foundation of pension plans is that the employer sets up a pension trust and promises to make periodic contributions into that trust. If there are sufficient assets, the employee will get the pension that has been described; if there are not, he does not get it; he gets something less. But the employer up until the present time generally has not made a promise to pay the pension, only to make periodic contributions. In this way the employer has no obligation under the law for the total amount of the promised pension benefits. It is because of this device that we have been able to build the large private pension system that exists today. I can say very confidently that if the law had required the employer to guarantee the payment of the pension 15 or 20 years ago when that system began to grow, it would not have grown in the proportions that it has up until the present time.

ERISA Leg. Hist., Vol. II at 3388-3389.

Congressional anxiety that failure to enact a provision *establishing* employer liability would permit employers to avoid all liability, by simply shifting it to the PBGC through plan terminations, dispels any notion that Congress believed ERISA was outlawing all employer limitation of liability clauses. As previously discussed, if employers were no longer to be able to limit or exclude their liability through such

clauses, they would have unlimited contractual liability to plan participants. The presence of such contractual liability would have been sufficient to dissuade employers from terminating plans simply to take advantage of plan termination insurance. Thus, one can only conclude that this aspect of congressional apprehension reflects legislative understanding that employer limitation of liability provisions were not to be vitiated by ERISA.

Congressional intent that employers not be burdened by the yoke of unlimited liability, aside from being evidenced by its failure to adopt any language clearly outlawing such a provision, and by its adoption of affirmative language expressly limiting employer liability, is highlighted by the entire legislative scheme which Congress selected—an elaborate government insurance program calling for premium payments and limited recoverability against employers. Congress simply could have declared all employer limitation of liability clauses void or could have guaranteed benefits, only after an employer's net worth had been exhausted.

Construing ERISA to provide that the inability to *collect* benefits from an employer due to a limitation of liability clause renders those benefits forfeitable and, thus, of necessity, neither guaranteed nor "vested" could undermine the plan termination insurance Congress took such pains to establish. For, if uncollectability of the benefit from the employer due to the allegedly proscribed clause renders the benefit forfeitable, should not the similar uncollectability of the benefit caused by the bankruptcy of the employer render the benefit equally forfeitable and, thus,

not guaranteed? Certainly there is no *practical* basis for distinction.

The Pension Benefit Guaranty Corporation's applicable regulation which rules that the *collectability* of the benefit from the employer has nothing to do with the forfeitability of the benefit effectuates congressional intent. This straightforward regulation which we submit is entitled to judicial deference provides as follows:

> (a) For the purposes of this part, a benefit payable with respect to a participant is considered to be nonforfeitable, if on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required of him under the provisions of the plan to establish entitlement to the benefit, except the submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit that returns all or a portion of a participant's accumulated mandatory employee contributions upon his or her death.

29 C.F.R. § 2605.6(a).

IV. Conclusion.

The decision of the Seventh Circuit in *Nachman* that the collectability of a plan benefit from the sponsoring employer has no significance with respect to the nonforfeitability of the benefit and, thus, impacts neither whether the benefit is guaranteed under Title IV of ERISA nor vested under Title I of ERISA, reflects Congress' intent when enacting the statute. Reversal of this decision in a manner which could lead to the legal conclusion that provisions limiting employer liability cause benefits to become non-

forfeitable in violation of ERISA § 203 could expose employers to potential unlimited liability and, hence, threaten the viability of the nation's private pension system.

Accordingly, it is respectfully submitted that the judgment of the Court of Appeals for the Seventh Circuit is correct and should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1557

NACHMAN CORPORATION,
Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION

AND

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE, AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR CONCORD CONTROL, INC. AS AMICUS CURIAE

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BRIEF FOR CONCORD CONTROL, INC. AS AMICUS CURIAE

This brief is being filed on behalf of Concord Control, Inc. as *amicus curiae* with the consent of all parties. Pursuant to Rule 42, the written consent of counsel for each party has been lodged with the Clerk.

INTEREST OF THE AMICUS CURIAE

Concord Control, Inc., *amicus* herein, a Massachusetts corporation, is the appellee in three consolidated cases now pending in the United States Court of Appeals for the Sixth Circuit as Nos. 78-3252, 78-3253 and 78-3254. Those appeals have been fully briefed and are awaiting oral argument in the Sixth Circuit.

Like petitioner Nachman Corporation, *amicus* has been confronted with an attempt by the Pension Benefit Guaranty Corporation ("PBGC") to expand its legislatively-created authority by engaging in an excessive, incorrect and unconstitutional application of its enabling statute. The PBGC has taken the position that it will guarantee payment of certain benefits to employees under a pension plan previously funded by *amicus*. If successful, the PBGC will seek under 29 U.S.C. §1362 to impose ultimate liability for these benefits on Concord Control in an amount which the PBGC calculates at approximately $761,000.

Concord Control's plan, like the Nachman plan, was terminated April 1, 1975, before the effective date of any of the minimum funding and vesting provisions of Titles I and II of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq*. It had been created pursuant to separate collective bargaining and pension agreements between Concord Control and a local of the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW") to provide a means for funding retirement and disability benefits for members of the local union. The plan was administered by a Board of Administration which was directed to take certain actions (including changing the benefit levels), but the pension agreement contained no authorization for the Board to require additional

employer contributions and required only that Concord Control make defined contributions to the plan on the basis of a certain amount of cents-per-hour-worked by each employee.

Each provision of the Concord Control pension agreement describing the potential benefits available under the plan contained a comparable limitation. The provisions dealing with retirement benefits, lump sum benefits, death benefits, and survivors' benefits each stated that the benefit was payable only "to the extent that funds are available under the Plan." The provisions regulating the distribution of assets upon termination likewise limited the employer's liability to the cents-per-hour-worked contributions, and the employees' rights to benefits were limited to those payable "to the extent of assets in the Retirement Fund." As noted, the Concord Control pension plan was terminated in 1975, prior to the effective date of the vesting and funding provisions of ERISA.

The judicial proceedings began when *amicus* filed a complaint for a declaratory judgment in the United States District Court for the Southern District of Ohio alleging, *inter alia*, that its plan's benefits were not guaranteed under the plan termination insurance program of Title IV of ERISA. The PBGC responded by applying for an order terminating *amicus*' plan under 29 U.S.C. § 1342. Those actions were consolidated, and the UAW intervened. In its unpublished opinion, findings of fact, conclusions of law and judgment, the district court ruled that the plan did not provide for employer contributions after September 1, 1974, and that it therefore was excluded from Title IV by virtue of 29 U.S.C. § 1321(b)(5).[1] The PBGC and the UAW have

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[1] *Amicus* is in a peculiar situation in that its pension contribution obligations ceased before the termination of the Plan in April 1975 and, indeed, before the enactment of ERISA in September 1974. Both the collective bargaining agreement and the pension agreement between Concord Control and the UAW local expired in August

appealed to the Sixth Circuit. The issue on which certiorari was granted in this case was briefed to the district court and has been advanced by Concord Control on appeal as an alternative basis for affirmance of the district court's judgment. *See United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). Thus the issue raised in the instant case is squarely applicable to *amicus*, and its disposition will vitally affect the appeal now pending in the Sixth Circuit.

1974 by reason of notices sent by the local union. No subsequent collective bargaining agreement or pension agreement has ever been adopted. In fact, on August 8, 1974, the UAW called and conducted an economic strike against Concord Control. That strike has never been resolved. Since the pension agreement obligated *amicus* to make payments to the Plan trustee only for "each hour worked for the Company" by each employee on the seniority list of the company "as defined in the collective bargaining agreement then in effect," the expiration of the collective bargaining agreement and pension agreement means that Concord Control has not made any contribution to the plan for hours worked by anyone since before the enactment of ERISA. The separate legal issues posed by these distinctive facts are not before the Court, but they do reveal the extent to which the PBGC has sought to assert its authority in a retroactive manner.

SUMMARY OF ARGUMENT

When Congress undertook the sizable task of reforming the American system of pension regulation, it recognized that some of the most significant features of the new law had to be phased in gradually in order to avoid substantial economic hardship for many employers. Accordingly, the resultant ERISA law, though initially effective in part in September 1974, did not impose mandatory funding and vesting requirements until plan years beginning in 1976. In and after 1976, pension plans were, for the most part, required to protect the plan's beneficiaries from forfeiture of vested benefits. Prior to that time, however, existing plans which provided that benefits would be limited to the amount of funds contributed at the time of termination (and which thus permitted "forfeiture" of the unfunded balance of possible benefits) were not only legally sufficient but also qualified for favorable federal income tax treatment as "qualified plans."

Congress, by creating the PBGC, intended to guarantee the actual receipt by plan participants of certain anticipated benefits under the terms of their respective plans. But the PBGC was given only a specific, limited charter. Under the terms of 29 U.S.C. § 1322(a), the PBGC has the power only to guarantee "the payment of all *nonforfeitable* benefits . . . under the terms of a plan . . ."[2] The term "nonforfeitable" is defined in 29 U.S.C. § 1002(19) to describe a benefit:

> ". . . which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan."

The Nachman plan was lawfully terminated in 1975—prior to the effective date of the mandatory vesting and funding pro-

[2] Emphasis ours here and throughout this brief except where otherwise indicated.

visions of ERISA. Hence, it was permitted to provide for forfeitable benefits, and it did so in the bargained-for stipulation that benefits paid upon termination of the plan would be limited to the assets of the fund then on hand. Participants' claims to the unfunded portion of the anticipated benefits were thus neither unconditional nor enforceable against the plan except to the extent of assets available. There is no contention that there was anything amiss about the administration or termination of the Nachman plan or the method by which it had been funded during its existence.

Nevertheless, despite the perfectly valid pre-1976 forfeiture provision in the Nachman plan and the fact that Congress has limited the PBGC's role to that of guaranteeing "nonforfeitable" benefits as provided by the governing plan, the PBGC asserted jurisdiction over the Nachman plan, sought to guarantee benefits in excess of those agreed to in the plan, and expressed its intention to impose ultimate liability against Nachman under principles of subrogation. The PBGC relied primarily on its own administrative definition of "nonforfeitable," which is completely incompatible with the Congressional definition in § 1002(19). The Seventh Circuit blessed the PBGC's endeavors, relying on an equally strained concept of "nonforfeitability."

The PBGC's effort to subject the Nachman plan to its jurisdiction should be rejected because: (a) it flies in the face of the clear statutory language and seeks radically to expand the authority granted to the PBGC by Congress; (b) it attempts to override the Congressionally ordained gradual phase-in of mandatory funding and vesting; (c) it negates the jurisdiction of the Treasury Department and the Department of Labor over funding and vesting; and (d) it is totally devoid of legal authorization.

ARGUMENT

I. The PBGC's Attempt to Guarantee Benefits Beyond the Value of the Nachman Plan's Assets Is Inconsistent With the Language of Section 1322(a).

Section 1322(a) specifically confines the PBGC's authority as a guarantor to "*nonforfeitable benefits . . . under the terms of a plan . . .*" Both of the emphasized phrases impose crucial limitations on the scope of § 1322(a). Each provision evinces a deliberate Congressional choice not to equate the scope of the immediately effective Title IV of ERISA with that of the phased-in Titles I and II.

The starting point for interpreting § 1322(a) is, of course, the statutory language itself. *International Brotherhood of Teamsters v. Daniel*, — U.S. —, 47 U.S.L.W. 4135, 4136 (Jan. 16, 1979); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 472 (1977). In this case, two subsidiary rules for interpreting that language are also implicated: (1) Congress is assumed to have used words in their ordinary meaning, *Banks v. Chicago Grain Trimmers Ass'n.*, 390 U.S. 459, 465 (1968); *Richards v. United States*, 369 U.S. 1, 9 (1962); *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947); and (2) the same word is presumed to have the same meaning throughout a statute. *E.g.*, *Hotel Equities Corp. v. Commissioner*, 546 F.2d 725, 728 (7th Cir. 1976); *Commissioner v. Ridgeway's Estate*, 291 F.2d 257 (3d Cir. 1961); *cf. Director, Office of Workers' Compensation Programs v. Rasmussen*, — U.S. —, 47 U.S.L.W. 4159, 4162 (Feb. 21, 1979). If the literal meaning of the statute is plain, the Court's sole function is to enforce its terms. *Flora v. United States*, 357 U.S. 63, 65 (1968); *Caminetti v. United States*, 242 U.S. 470, 485 (1917).[3]

In addition to these universal maxims, certain more specialized canons of construction govern this case. Although the Court did not grant certiorari on the constitutional issue raised by Nachman, the presence of a substantial constitutional question necessarily affects consideration of the statutory issue. We respectfully suggest that this Court is obligated under these circumstances to interpret the statute to avoid the constitutional issue if at all possible. *E.g., Califano v. Yamasaki*, — U.S. —, 47 U.S.L.W. 4765, 4768 (June 20, 1979); *Pernell v. Southall Realty*, 416 U.S. 363, 365 (1974); *Lynch v. Overholser*, 369 U.S. 705, 710-11 (1962).

Furthermore, since the constitutional infirmity arises from the suggested retroactive impact of the statute and the resultant imposition of additional liability to former employees,[4] the

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[3] It is unlikely that Congress intended to abrogate these long-held tenets of construction by its enactment of ERISA. Hence, we are mystified by the Seventh Circuit's castigation of the district court for resorting to rules of "ordinary English speech" instead of employing as yet undefined and esoteric principles of "technical pension English." *See* 592 F.2d at 953.

Indeed, the Court of Appeals appears to have ignored the wise counsel of *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944), where the Court invalidated an administrative regulation promulgated under a narrowly circumscribed grant of authority. Mr. Justice Frankfurter's words speak directly to the Seventh Circuit's error:

> "For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. The idea which is now sought to be read into the [statute] is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it." *Id.* at 617-18.

Here, as in *Addison*, the mere fact that a statute deals with the potentially technical areas of labor relations and taxation does not signal the necessary "hint" that Congress used words such as "nonforfeitable" and "unconditional" "in any but an ordinary sense." *See also NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322, 324-25 (1951); *Rosenman v. United States*, 323 U.S. 658, 661 (1945).

[4] *See Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

Court should also be guided by the rubric of *Greene v. United States*, 376 U.S. 149, 160 (1964), that:

> "the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' "

Indeed, the Court has already indicated that this maxim is entitled to great weight in dealing with ERISA by its observation in *City of Los Angeles, Department of Water & Power v. Manhart*, 435 U.S. 702, 721 (1978), that "rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result."

Having identified the ground rules of statutory construction, we turn now to the provisions in question.

A. The Nachman Plan Does Not Provide "Nonforfeitable" Benefits.

Congress pointedly limited the guarantor role of the PBGC to benefits that are "nonforfeitable." This term is defined by 29 U.S.C. § 1002 (19):

> "The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, *which is unconditional, and which is legally enforceable against the plan.*"

All precepts of statutory interpretation conjoin to prove convincingly that the Seventh Circuit misconstrued this definition and misapplied it to the Nachman plan.

A straightforward and common sense approach to the statutory language demonstrates that the Nachman plan does not provide "nonforfeitable" benefits. Under the Nachman and Concord Control pension plans, ***both the anticipated benefits and the employees' rights or claims to those benefits were totally conditional*** on the amount of funds in the plan.

There was no legally enforceable claim, right or benefit beyond the claim, right or benefit payable from the funds on hand, and no employee could obtain a judgment for more than his pro rata share of those assets. *See Cowles v. Morris & Co.*, 330 Ill. 11, 161 N.E. 150, 154-55 (1928). Neither benefits nor claims to benefits beyond the value of the assets in the trust fund were legally enforceable against the Nachman plan because the plan (a) limited an employee's right or claim (through the third sentence of Article V, Section 3 and through Article X, Section 3), and (b) limited the employer's liability (through the fourth sentence of Article V, Section 3). In short, the plan could not lawfully pay benefits in excess of the amount of the underlying funds, and the employer was not obligated to fund the plan beyond its cents-per-hour-worked contractual obligations.

Although the definition of "nonforfeitable" in §1002(19) appears in Title I of ERISA, it is equally applicable to Title IV. The well-established presumption that the same word has the same meaning throughout a single statute may be displaced only by some clear or affirmative indication that a different construction was intended. *E.g., Schooler v. United States*, 231 F.2d 560, 563 (8th Cir. 1956); *Sampsell v. Straub*, 194 F.2d 228, 230 (9th Cir. 1951), *cert. denied*, 343 U.S. 927 (1952). There is no indication anywhere that "nonforfeitable" in §1322 (a) should be accorded a different meaning for purposes of that section that it has in Title I. The failure to make the statutory definition of "nonforfeitable" explicitly applicable to § 1322(a) does not reflect any Congressional intent to ascribe

a different meaning to the term in that section. *Caolo v. Dulles*, 115 F.Supp. 125 (D. P. R. 1953). Indeed, both the vesting and minimum funding provisions of Title I, to which the statutory definition expressly pertains, and the plan termination insurance provisions of Title IV implement the legislative purpose stated in 29 U.S.C. §1001(c). Accordingly, there is a compelling reason to apply the same definition uniformly throughout the statute. *See Folker v. Johnson*, 230 F.2d 906 (2d Cir. 1956).

Even the Seventh Circuit in *Nachman* rejected the PBGC's effort to confine the statutory definition to Title I. That Court said: "We agree with the district court that the definition of 'nonforfeitable' provided in Title I should govern the construction of that term's use in Title IV." 592 F.2d at 952. The Court then went astray, however, by (a) disregarding the provisions of the Nachman plan that limited the enforceability of benefits (or claims) against the plan, and (b) misinterpreting the statutory definition as permitting benefits (or claims) to be regarded as "unconditional" merely because the employee had satisfied certain conditions.

The Seventh Circuit initially erred by characterizing the Nachman plan as solely involving an exculpatory clause limiting *employer* liability, as contrasted (by the Court) with the liability of the plan. The Court of Appeals thus simply disregarded both that portion of Article V of the Nachman plan which expressly states, "Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund," and the provisions of Article X, Section 3 for pro-rating of benefits upon termination. The Nachman plan (like the Concord Control plan) thus stipulates that benefits are no more "legally enforceable" against the plan than they are against the employer. The Court of Appeals' proffered distinction was therefore without basis in either law or fact.

The PBGC's theory—adopted by the Seventh Circuit—that benefits (or claims) are "unconditional" if the participant has satisfied all of the conditions precedent to "vesting" is inconsistent with: (a) The ordinary meaning of the term "unconditional"; (b) the Congressional rejection of this approach to the term "nonforfeitable"; (c) the prior Congressional and Treasury Department use of "nonforfeitable"; (d) the statutory structure of Title I; (e) the grammar and syntax of §1002(19); and (f) the Treasury Department's current interpretation of "nonforfeitable." Inasmuch as the Nachman brief thoroughly treats the first three points, we will confine ourselves to the last three.[5]

The approach of the Court of Appeals cannot be reconciled with 29 U.S.C. §1053(a)(3). If benefits were "nonforfeitable" merely upon the employee's fulfillment of conditions precedent, then §1053(a)(3) would be superfluous because it specifically provides that certain after-occurring events may legitimately reduce the benefits payable without rendering those benefits "forfeitable."[6] This section also illustrates the difference between "nonforfeitable" and "vested" because, as fully implemented, it expressly sanctions the forfeiture of certain vested benefits.

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[5] We wish to emphasize, nonetheless, the significance of the word "unconditional" and the extent of the distortion visited upon that ordinary term by the strained interpretation of the PBGC and the Court of Appeals. Had Congress intended "unconditional" to be limited to particular types of conditions, it could have so defined "unconditional" or have chosen other words to express such an extent. Since it did not do so, "unconditional" must be given its ordinary meaning. *E.g., NLRB v. Highland Park Mfg. Co., supra,* 341 U.S. at 324-25. *See also 62 Cases of Jam v. United States,* 340 U.S. 593, 599-600 (1951).

[6] Moreover, Congress plainly contemplated that certain conditions subsequent that were beyond the control of the plan participant, or which did not even directly involve a participant, would constitute forfeitures because it felt obliged to state that termination of benefits upon a participant's death did not make the benefits "forfeitable," §1053(a)(3)(A), and to authorize changes in benefits through limited retroactive plan amendments. *See* §1053(a)(3)(C).

The Seventh Circuit was preoccupied with the impression that the legislative history of ERISA had equated the terms "vested" and "nonforfeitable." The legislative history of §1053, however, states that "Under the conference substitute, *except as outlined below*, an employee's rights, once vested, are not to be forfeitable for any reason." Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 271 (1974), 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5052. This passage directly confirms Congress' understanding that the terms were not synonymous because §1053 (a)(3) provided that some "vested" benefits could nonetheless be "forfeitable"—that is, not "nonforfeitable."

The question for this Court is not whether legislators used the terms interchangeably in their discussions or debates but whether *the statute* did so. It obviously did not. Congress provided insurance only for certain vested benefits under the terms of a plan. It did not supply this protection for *all* such benefits, however, but only for those that were *both* "vested" and "nonforfeitable."[7]

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[7] To the exent that some Senators or Representatives may have used the terms "vested" and "nonforfeitable" interchangeably, this use does not shed any light on the question before the Court because the legislators did not expressly address the narrow issue of whether the terms should be regarded as interchangeable during the interim period between the enactment of ERISA and the effective date of Titles I and II. Following the latter date, the terms are indeed virtually interchangeable because there are so few events that can lawfully constitute a forfeiture. Before that date, however, everyone agrees that the terms had very different significances. Statements by Congressmen or even committee reports using the terms in a general fashion can, and we submit must, be read as merely referring to the post-1976 period when all portions of ERISA were to be in operation. *Cf. Jewell Ridge Corp. v. Local 6167, UMW,* 325 U.S. 161, 168-69 (1945).

This Court's clarification of this issue is needed because several district courts have now subscribed to the Seventh Circuit's erroneous conclusion that any benefit vested under a plan during the interim period is "nonforfeitable." *See, e.g., Lear Sigler, Inc. v. Pension Benefit Guaranty Corporation,* Civil No. 77-1600, 238 BNA Pension Rptr. D-3, D-4 (E.D. Mich., April 20, 1979); *In re Williamsport Milk Products Co.,* Civil Action No. 76-1308, 206 BNA Pension Rptr. D-15, D-18 (M.D. Pa., August 30, 1978).

The reading of the statute by the Court of Appeals also embodies a significant error of syntax because the fulcrum of its holding is its perception that the adjective "unconditional" in § 1002(19) modifies "claim" rather than "benefit." The court has effectively rewritten §1002(19) by deleting the language which appears below in brackets:

> "The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary [to that part of an immediate or deferred benefit under a pension plan] which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan."

The result of this unwarranted revision of the statute is to eliminate the requirement that the *part* of the benefit being claimed must be unconditional and legally enforceable against the plan. By construing these qualifications to modify "claim" rather than "benefit," the Seventh Circuit violated "one of the simplest canons of statutory construction" known as the "last antecedent rule." *See United States v. Hughes*, 116 F.2d 613, 616 (3d Cir. 1940). This rule dictates that:

> "Ordinarily, qualifying phrases are to be applied to the words or phrase immediately preceding and not to be construed as extending to others more remote." *United States v. Pritchett*, 470 F.2d 455, 459 (D.C. Cir. 1972).

Accord, People v. Consolidated Rail Corp., 589 F.2d 1327, 1332 (7th Cir. 1978); *National Surety Corp. v. Midland Bank*, 551 F.2d 21, 33-34 (3d Cir. 1977) *See* 2A Sands, STATUTES AND STATUTORY CONSTRUCTION § 47.33 (4th ed. 1973).

The proper grammatical analysis reveals that the three qualifying clauses in the definition modify "that part of an immediate or deferred benefit," rather than "claim." Thus properly read, the section is reasonably clear: Only that *part* of a *benefit* which (a) arises from service, (b) is unconditional, and (c) is legally enforceable against the plan is therefore declared to be "nonforfeitable." In the case of the Nachman and Concord Control plans, the only *part* of the benefit that is legally enforceable and unconditional is that part for which assets are already in the fund. Although the definition in § 1002(19) is hardly a model of English composition, this proper diagramming of its structure at least provides the coherence lacking in the Seventh Circuit's interpretation.

Finally, the Court of Appeals' view of the statutory definition of "nonforfeitable" contradicts the approach to the identical term by the Treasury Department in its regulations issued to enforce Title II of ERISA. In Treas. Reg. § 1.411(a)-4(a) (1977), the Department has announced that, "Rights which are conditioned upon a sufficiency of plan assets in the event of a termination or partial termination are considered to be forfeitable because of such condition." Treasury's interpretations in the form of regulations are universally accorded great weight and overruled only for solid reasons. *E.g., Commissioner v. South Texas Lumber Co.*, 333 U.S. 496, 501 (1948). In light of the structure of ERISA and the grammar of § 1002(19), there is no such "solid reason" here. It is inconceivable that the term "nonforfeitable" should have different meaning in Title I, imposing substantive obligations, than in Title II, amending the Internal Revenue Code to make compliance with those same obligations a condition of tax deductibility. Treasury's regulation thus points in the same direction as the other signposts which establish that the Concord Control and Nachman plans did not contain "nonforfeitable" benefits.

B. There Were No Benefits in Excess of Available Funds Guaranteed "Under the Terms of" the Nachman Plan.

The other important portion of § 1322(a) demonstrates that the statute continued the pre-ERISA rule that *the terms of a plan* were the measure of both the employees' rights (or claims)

and the employer's liability. In *Smith v. Union Carbide Corp.*, 350 F.2d 258, 261 (6th Cir. 1965), the court noted that under pre-ERISA law:

> "The only rights the plaintiff has to pension benefits arise out of the contract between the union and the defendant. He is not entitled to any pension benefits either in law or equity that are not given to him within the four corners of that instrument."

See also Finnell v. Cramet, Inc., 289 F.2d 409 (6th Cir. 1961); *United Steel Workers Local No. 2098 v. International Systems & Control Corp.*, 566 F.2d 1135 (10th Cir. 1977); *Craig v. Bemis Co.*, 517 F.2d 677, 680-81 (5th Cir. 1975). In particular, pre-ERISA law did not impose extracontractual obligations on an employer to fund all benefits provided under a pension plan and did not preclude the forfeiture of benefits, whether "vested" or not. Before ERISA, the only federal statutory references to "nonforfeitable" pension benefits appeared in former Sections 401(a)(7) and 401(d)(2) of the Internal Revenue Code of 1954. In each of those sections, the term was applied only to rights in specific, pre-existing assets. The Internal Revenue Service employed the term in a corresponding fashion and permitted plans to remain "qualified" for tax purposes despite the forfeiture of "vested" benefits. Rev. Rul. 69-421, 1969-2 Cum.Bull. 59, 78-9; *see also* pre-ERISA Treas. Reg. §1.401(b)-1(a) (2)(i) (1964).

In signing a pension plan such as those bargained for by Nachman and Concord Control with the UAW, all parties thereby agreed to an arrangement in which the employees' rights or claims to benefits were limited to the value of the plan's assets at the time of distribution, and the employer had no obligation to make any payments beyond the specified cents-per-hour-worked. There was no promise or reasonable expectation that benefits would exceed the assets available. *See Bianchin v. McGraw-Edison Co.*, 438 F.Supp. 585, 587-88 (W.D.

Pa. 1976), *aff'd mem.*, 564 F.2d 89 (3d Cir. 1977). These legitimate, bargained-for limitations on the employer's liability and on the employees' claims to benefits prove beyond dispute that there were no "nonforfeitable benefits" *under the terms of such plans* beyond the value of those assets.

The only legislative history directed at the actual language of §1322(a) recognized that §1322(a) as enacted differs from the previous House and Senate bills because it restricts insurance coverage to benefits "guaranteed" by the plan. Conf. Rep. No. 93-1280, *supra* at 368, 1974 U.S. CODE CONG. & ADMIN. NEWS at 5147-48. This comment reconfirms that the statute as enacted represented a compromise between the House bill, which insured only those benefits required to be vested under Title I, and the Senate version. The compromise retained the focus on the plan's provisions, as contrasted with the House approach which tied Title IV to the future implementation of Title I, but it emphasized that covered benefits must truly be "guaranteed" by the plan.

This very analysis formed the nucleus of the rationale of *A-T-O, Inc. v. Pension Benefit Guaranty Corporation*, 456 F. Supp. 545 (N.D. Ohio 1978), *appeal docketed*, No. 78-3269 (6th Cir.). *A-T-O* involved a pension agreement where (a) contributions were to be made on a cents-per-hour-worked basis, (b) benefits were specifically conditioned on the sufficiency of assets in a pension trust, and (c) claims to benefits were enforceable against the plan only to the extent of those assets. *Id.* at 547. The court held that any benefits that could not be satisfied out of the assets upon termination of the plan (in November 1974, before Titles I and II were effective) were forfeitable and not subject to PBGC guarantee under Title IV. Referring to the Conference Committee Report discussed above, the court stated:

> "The quoted language clearly distinguishes between benefits that are 'vested' and those that are 'guaranteed by [the

provisions of the pre-ERISA pension plan agreement],' because the obvious converse of the quoted language is that benefits could be vested without being guaranteed by the pension plan. A fair reading of the Congressional intent in the noted insurance coverage discussion is that upon the prospective imposition of the minimum vesting and funding provisions of Title I, the benefits guaranteed under Title IV would automatically be elevated to the same levels as provided in Title I; however, *insurance coverage for benefits accrued prior to the enactment of ERISA would be determined by the provisions of the individual pension plan.*" *Id.* at 553.

In the instant case, the Seventh Circuit reached a different inference from the legislative history because it deemed this analysis to over-emphasize the word "guarantee." 592 F.2d at 954 n.9. That result, however, bestows no weight whatsoever on this crucial word of "ordinary" English, fails to afford adequate consideration to the competing policies and pressures that accounted for the final form of ERISA, and thereby disregards the admonition of *United States v. Sisson*, 399 U.S. 267, 298 (1970), that:

> "Care must be taken, however, to respect the limits up to which Congress was prepared to enact a particular policy, especially when the boundaries of a statute are drawn as a compromise resulting from the counter-vailing pressures of other policies."

It also contravenes the pointed analysis that:

> "The conflicting purposes of Title IV argue against any interpretation of the Act to assert employer liability which the statute does not clearly and directly impose." Note, *Termination Liability Under Title IV of ERISA: Impact on Companies Under Common Control*, 27 CASE W. RES. L. REV. 945, 963 (1977).

The extent of the Seventh Circuit's statutory misadventure is highlighted by *Riley v. MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977), which the Seventh Circuit ironically cited for guidance in concluding that it would be erroneous to read "technical pension language as if it were ordinary English speech." See 592 F.2d at 953, *quoting Riley v. MEBA Pension Trust*, 570 F.2d at 408-09.[8] *Riley* actually confirms the necessity of (i) a common sense approach to the issue of forfeiture, (ii) a strict attention to the terms of the particular plan, and (iii) a scrupulous fidelity to the delayed effective dates of Titles I and II. It thereby supports the conclusion that a plan such as Nachman's does not contain "nonforfeitable benefits."

The *Riley* plan, unlike the Nachman and Concord Control plans, continued into 1976 and accordingly became subject to the vesting and funding rules of Titles I and II of ERISA. The plaintiff was denied benefits under a rather ambiguous condition in the plan which was construed by the plan trustees to cut off benefits because he went to work for the federal government. The Second Circuit held that this restriction on his ability to collect benefits made his claim legally unenforceable against the plan *and thus constituted a forfeiture within the meaning of ERISA*. Because the vesting requirements of 29 U.S.C. §1053 had become applicable to *that* plan, however, this attempted forfeiture was ineffective. *Id.* at 409.

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[8] There is no indication in *Riley* that Judge Friendly meant to repudiate the principle that Congress is assumed to have used words in their ordinary meaning. Judge Friendly's remark was made to support the rejection of a strained argument that an indefinite suspension of benefits was not a forfeiture, and it thus offers scant comfort for the PBGC's effort to convert a permanent cut-off of benefits occurring when there are insufficient assets upon termination into something less than a "forfeiture." To the extent that the PBGC may invoke Judge Friendly's remark as evidence of its would-be special expertise in "pension English," its suggestion should be taken with an ample dosage of salt. "Pension English," like ordinary English, has been a subject of *judicial* inquiry and analysis for decades. Surely this Court's (and Congress') understanding of the mother tongue is at least equal to that of a fledgling federal bureau.

Significantly, the Second Circuit's analysis was different for benefits payable before January 1, 1976. The court stated, *l.c.* 412, that "Riley's entitlement to monthly payments prior to that date depends on [other] principles of law," and affirmed the district court's conclusion that Riley's 1975 benefits were properly forfeited *under the terms of the pension plan.* As applied to the Concord Control and Nachman plans, which admittedly were never subject to Section 1053, *Riley* thus established that restrictions in a plan limiting *payment* of claims (but not necessarily "entitlement" to them) make the benefits forfeitable and thus beyond the reach of the PBGC with respect to pre-1976 plan years.

II. The PBGC's Attempt to Guarantee Benefits Beyond the Value of the Nachman Plan's Assets Is Inconsistent With the Delayed Effective Dates of Other Parts of ERISA.

In adopting ERISA, Congress did not purport to effect an overnight transformation of all aspects of pension law. Title IV of ERISA, containing the plan termination insurance program, became effective on September 2, 1974. The bulk of the statute, however, provided for staggered effective dates. Most particularly, Title I (which regulated participation and vesting and required minimum funding of pension plans) and Title II (which incorporated the requirements of Title I as conditions to tax-free treatment of trusts and current tax deductibility of employer contributions) were given a separate starting time. For plans in existence on January 1, 1974, these vesting and funding provisions of ERISA became effective only for "plan years" beginning *after* December 31, 1975. 29 U.S.C. §§ 1061(b), 1086(b).[9]

[9] The issue posed by this case is not the only ERISA issue that requires careful recognition of the delayed effective date of Title I. In *Riley v. MEBA Pension Trust, supra*, the Second Circuit made short shrift of a claim that the vesting provisions of Title I should be

The Concord Control and Nachman plans provided for "forfeitures" because the rights of beneficiaries were confined to those funds on hand at termination. The issue directly presented here, however, is *not* whether those forfeiture provisions were valid or invalid. If that were the question, the forfeitures would be upheld because the provisions of ERISA prohibiting such forfeitures did not become effective until after these plans had terminated. Yet here the PBGC is trying to bootstrap itself indirectly into a position that it could never achieve directly. By seeking jurisdiction over these plans under the guarantee provisions of Title IV and asserting liability of astronomical proportions, the PBGC is effectively asking this Court to hold that the forfeiture provisions of the plans are in fact invalid and that it is entitled to enforce liability far beyond the contemplation of Congress or the parties thereto. This is a flagrant usurpation of authority and a dramatic reconstruction of the entire statutory scheme.

A proper understanding of the PBGC's authority must begin with the teaching of *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1972):

> "It is well established that our task in interpreting separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose."

The statute must be interpreted with reference to its entire text and without undue focus on a single sentence or portion.

used to develop a federal common law applicable to periods before their effective date:

> ". . . care must be taken not to subvert the intention of Congress to postpone the effective date of the vesting provisions in order to afford a fair opportunity to bring plans and their application in line with the new vesting requirements." 570 F.2d at 413.

See also Schlansky v. United Merchants & Manufacturers, Inc., 443 F.Supp. 1054, 1064 (S.D. N.Y. 1977); *Keller v. Graphic Systems of Akron, Inc.*, 422 F.Supp. 1005, 1014 (N.D. Ohio 1976).

See Philbrook v. Glodgett, 421 U.S. 707, 713 (1975); *Richards v. United States, supra*, 369 U.S. at 11.

An analysis of the complete statute compels the conclusion that plans such as these did not contain benefits subject to PBGC guarantee beyond the value of their assets at termination. Any other result would not only be inconsistent with the plan for gradual statutory implementation, which postpones imposition of the new vesting and funding requirements until plan years beginning in 1976, but would also in large part negate 29 U.S.C. § 1053(a). That section requires plans to be amended as of January 1, 1976, to provide that benefits cannot be forfeited except in certain narrowly circumscribed situations. Yet if plans such as these, which the Court of Appeals acknowledged to be common before the passage of ERISA, already contained PBGC-guaranteed benefits notwithstanding their explicit language limiting benefits to the value of their assets, there would be no reason for § 1053 to require plan amendments. Title IV would have already effectively imposed those amendments. By failing to devote adequate attention to the statute as a whole and the relationship between its component parts, the Seventh Circuit violated the precept that a statute will not be interpreted to render a provision inoperative, redundant or essentially superfluous. *Colautti v. Franklin*, — U.S. —, 47 U.S.L.W. 4094, 4098 (Jan. 9, 1979); *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307-08 (1961); *Ruiz v. Morton*, 462 F.2d 818, 820 (9th Cir. 1972), *aff'd*, 415 U.S. 199 (1974).

The need to interpret Title IV so as to avoid abrogating the delayed effective date of Titles I and II is also buttressed by the stated Congressional desire that these portions of ERISA should operate harmoniously. "The termination insurance program is intended to work hand-in-hand with the minimum funding standards imposed by the bill . . ." S.Rep. No. 93-383, 93d Cong., 2d Sess. 25 (1974), 1974 U.S. CODE CONG. & ADMIN. NEWS 4890, 4911. The Seventh Circuit's analysis severs this

complementary relationship by overextending Title IV in disregard of the delayed effective date of Titles I and II with respect to the otherwise "forfeitable" benefits of the Nachman and Concord Control plans.

This Court on several occasions has acknowledged the step-by-step program of implementation built into ERISA by Congress. In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 249 n.23 (1978), the Court differentiated ERISA from the Minnesota statute there in question by stating:

> "Compare the gradual applicability of ERISA, which itself is not even mandatory. At the outset ERISA did not go into effect at all until four months after it was enacted. 29 U.S.C § 1144 (1976 ed.). Funding and vesting requirements were delayed for an additional year."

In *City of Los Angeles, Department of Water & Power v. Manhart*, 435 U.S. 702, 721-22 n.40 (1978), the Court observed:

> "In 1974, Congress underlined the importance of making only gradual and prospective changes in the rules that govern pension plans. In that year, Congress passed a bill regulating employee retirement programs. Employee Retirement Income Security Act of 1974, 88 Stat. 829. The bill paid careful attention to the problem of retroactivity. It set a wide variety of effective dates for different provisions of the new law; some of the rules will not be fully effective until 1984, a decade after the law was enacted."

See also Malone v. White Motor Corp., 435 U.S. 497, 499 n.1 (1978). Having recognized and sought to alleviate the enormous economic burdens of the new law by postponing the effective date of Titles I and II, Congress could not have meant to allow the PBGC by administrative fiat to impose the same financial millstone on plans lawfully terminated before the 1976 effective date of ERISA's vesting and funding requirements. The

Nachman case thus requires the Court to address this issue directly and to give real meaning to its earlier observations.

Contrary to the opinion expressed by the Seventh Circuit. a proper statutory reconciliation gave Title IV a limited but appropriate effect during the period before January 1, 1976. Before the vesting and funding standards of Titles I and II became effective, the PBGC's authority to guarantee benefits was limited to benefits for which the plan had assets on hand only if the particular plan in question tied forfeitability to asset insufficiency. All that the PBGC was precluded from doing is precisely what it seeks to do here—to pay benefits that were truly forfeitable under the terms of the governing plan and then subsequently to assert employer liability for those amounts The proper statutory reconciliation does not mean that the PBGC insured benefits vested only by virtue of Title I, but it does mean that the terms of a plan controlled until Title I amendments became mandatory for plans in existence before ERISA was enacted.

III. The PBGC Regulation Defining "Nonforfeitable" Is Invalid and Is Not Entitled to Deference in Interpreting Section 1322(a).

In part III of its opinion, the Court of Appeals held that the PBGC definition of "nonforfeitable" in 29 C.F.R. § 2605.6(a) is consistent with the definition of that term found in 29 U.S.C. § 1002(19). The key provision of this would-be regulation specifies that benefits are "nonforfeitable" once "the participant . . . has satisfied all of the conditions required of him under the provisions of the plan to establish entitlement to the benefit. . . ."[10]

[10] 29 C.F.R. §2605.6(a) provides in full:

"(a) For the purposes of this part, a benefit payable with respect to a participant is considered to be nonforfeitable, if on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required of him under the provisions of the plan to establish entitlement to the benefit, except the submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit that returns all or a portion of a participant's accumulated mandatory employee contributions upon his or her death."

At least with respect to the interim period from September 2, 1974, through January 1, 1976—before the minimum funding and vesting provisions of ERISA were fully implemented—the Seventh Circuit's acceptance of the PBGC definition was fundamentally unsound. This regulation is unauthorized, arbitrary, and inconsistent with the language of ERISA. It should not be followed either as substantive law or as a guide to interpreting the controlling statute.

At the threshold, the Court of Appeals failed to recognize that the PBGC definition departs significantly from both the clear meaning of "nonforfeitable" as defined in Title I and the context in which that term appears in § 1322(a). This regulation does not comport with the statutory definition because § 1002 (19) recognizes the terms of the plan as the source of the "enforceability" of rights and as the touchstone for a determination of nonforfeitability. The PBGC definition, on the other hand, totally ignores this crucial factor in assessing nonforfeitability. The regulation (and the Court of Appeals' analysis thereof) also errs by failing to consider the structure of § 1322(a), which likewise requires attention to the "terms of a plan" for identification of those nonforfeitable benefits which are to be guaranteed by the PBGC.

In assaying the PBGC regulation, the Court should be guided by its analysis last Term in *Southeastern Community College v. Davis*, — U.S. —, 47 U.S.L.W. 4689, 4692-93 (June 11, 1979). There the respondent claimed that certain federal regulations required the petitioner to undertake affirmative action to accommodate handicapped persons. Based on the language

and structure of the controlling federal statute, the Court concluded that the regulations did not require such action and that, if they did, they were unauthorized:

> "Moreover, an interpretation of the regulations that required the extensive modifications necessary to include respondent in the nursing program would raise grave doubts about their validity. If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of §504. Instead, they would constitute an unauthorized extension of the obligations imposed by that statute." *Id.* at 4692.

The PBGC regulation must be approached with equal caution because the expansive interpretation of the Seventh Circuit produces unauthorized and unreasonable consequences.

A. The PBGC Regulation Purports to Affect Substantive Rights but Lacks Statutory Authorization.

The PBGC regulation can be given binding effect during the interim period before January 1, 1976, *only if* the PBGC has been granted authority by Congress, and has exercised that authority, to "create" a special definition of "nonforfeitable" for purposes of Title IV of ERISA.[11] Only by virtue of such authority could the PBGC expand the statute to guarantee benefits which would otherwise be forfeitable during the interim period. This is particularly true where, as in the case of Concord Control, for example, the Company may be exposed to a liability in excess of $700,000.

[11] The PBGC has so characterized its action before the Courts of Appeals in both the *Nachman* and *Concord Control* cases.

The PBGC purported to adopt the regulation under 29 U.S.C. §§1322(a) and 1302(b)(3).[12] This Court's unanimous opinion in *Chrysler Corp. v. Brown*, — U.S. —, 47 U.S. L.W. 4434 (April 18, 1979), makes it clear that while the regulation purports to be substantive in nature, it lacks the necessary and appropriate statutory underpinnings. The PBGC definition in 29 C.F.R. § 2605.6(a) flunks the first and foremost of the three tests for substantive agency rule-making established by *Chrysler* because there is no "nexus between the regulations and some delegation of requisite legislative authority by Congress." 47 U.S.L.W. at 4440.

As previously noted, § 1322(a) permits the PBGC only to guarantee "nonforfeitable benefits . . . under the terms of a plan." No quantum of liberality in construction can produce even an inference that this provision empowers the PBGC to classify benefits as "nonforfeitable," much less to depart from the general meaning of the term as defined in Title I of ERISA.

The second source cited by the PBGC in support of its rule-making power is §1302(b)(3), which gives the PBGC the authority:

> "[T]o adopt, amend, and repeal, by the board of directors, bylaws, rules and regulations relating to the conduct of its business and the exercise of all other rights and powers granted to it by this Act."

Although there is no question that this provision grants rule-making authority, it is equally apparent that it cannot be construed as a broad delegation of legislative power. It is no more than a general grant of housekeeping authority to the PBGC to arrange its affairs and to exercise those powers that have otherwise been conferred upon it. As such, it is parallel in its

[12] *See* 40 Fed. Reg. 24206 (June 5, 1975), and 40 Fed. Reg. 43509 (Sept. 22, 1975).

terms and function to 5 U.S.C. § 301, which this Court in *Chrysler* held did not authorize "substantive rules." *See* 47 U.S.L.W. at 4442-43.

In short, Congress did not grant the PBGC any express authority to expand the scope of its jurisdiction by creating a special Title IV definition of nonforfeitable basic benefits.[13] *Compare National Broadcasting Co. v. United States,* 319 U.S. 190, 217-19 (1943). This glaring absence is entitled to great

[13] Although Congress did provide in §1322(c) that the PBGC should have authority to provide for the guarantee of "other classes of benefits . . . as it determines to be appropriate," the PBGC cannot invoke this provision as a basis for the instant regulation for several reasons. First, Congress intended that this authority be exercised to guarantee "nonbasic" benefits, *i.e.,* annuities in excess of $750 per month, medical benefits, and the like. Conf. Rep. No. 93-1280, *supra* at 368, 1974 U.S. CODE CONG. & ADMIN. NEWS at 5148. The benefits at issue in this case are basic retirement benefits and thus do not fall within the class of benefits referred to by Congress in enacting §1322(c).

Secondly, the PBGC cannot rest the current regulation on §1322(c) because the Notice of Proposed Rulemaking limited its effect and impact to nonforfeitable benefits by specifically providing that the purpose of the regulation was "to describe those benefits guaranteed under Section 4022(a) of the Act." 40 Fed.Reg. 24206, 24209 (June 5, 1975). The purpose clause was not changed in this respect in the final rule, 40 Fed.Reg. 43509, 43510 (Sept. 22, 1975), and it was not affected by the 1978 amendment to the regulation. *See* 29 C.F.R. §§2605.1(a) and 2605.3(a).

Finally, and most basically, the PBGC cannot rely on §1322(c) because its Notice of Proposed Rulemaking did not cite that statute. Any regulation based on §1322(c) would be deficient under the third *Chrysler* criterion relating to compliance with procedural requirements. The applicable procedural statute in this case, as in *Chrysler,* is 5 U.S.C. §553 (the Administrative Procedure Act), and a regulation based on §1322(c) would not comply with the requirement of 5 U.S.C. §553(b)(2) that the notice of proposed rulemaking include reference to the legal authority for the rule. *See also Morton v. Ruiz,* 415 U.S. 199, 235 (1974). There is not even an indirect indication in the Notice of Proposed Rulemaking or elsewhere that the PBGC was attempting to define §1322(c) benefits, and none of the comments received by PBGC addressed this issue. *See* 40 Fed.Reg. at 43509-10.

weight because of the potentially cataclysmic financial effect on the employer and the serious constitutional problems thus spawned. Moreover, an analysis of the structure of ERISA and its legislative history confirms that Congress did not confer general quasi-legislative authority on the PBGC. There is no indication that Congress intended the PBGC to become involved in reviewing, approving, or acting with respect to plans to determine whether they provided forfeitable or nonforfeitable benefits. This function was delegated by Congress to the Secretary of the Treasury in § 1012 of ERISA, 26 U.S.C. § 411, and not to the PBGC.[14]

B. The PBGC Regulation Is Not Entitled to Deference in Interpreting Section 1322(a).

The deference to which a pronouncement of an administrative agency is entitled varies greatly depending on the circumstances. As the Court recently stated in *National Muffler Dealers Ass'n. v. United States,* — U.S. —, 47 U.S.L.W. 4277, 4278 (Mar. 20, 1979):

> "In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. . . . Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the [agency's] interpretation and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute."

[14] Section 1012 of ERISA amended the Internal Revenue Code of 1954 by, *inter alia,* adding §411. Under §411 of the Code, a pension trust will not qualify under §401(a) of the Code unless it provides "nonforfeitable" benefits. The Secretary of the Treasury is responsible for §401(a) qualification determinations.

In this case, the PBGC regulation is arbitrary, unreasonable, unpersuasive and certainly does not merit any deference in interpreting the statute.[15]

The determination of the meaning of §1322(a) is peculiarly a judicial function because it involves the scope of PBGC jurisdiction. As stated in *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946), "[a]n agency may not finally decide the limits of its statutory power." In *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973), the Court reiterated the observation that: ". . . an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate."

The meaning of "nonforfeitable" in §1322(a) is, of course, also an issue of statutory construction. The Court has repeatedly observed that:

> ". . . the courts are the final authorities on issues of statutory construction . . . and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' "

SEC v. Sloan, 436 U.S. 103, 118 (1978), *quoting NLRB v. Brown*, 380 U.S. 278, 291 (1965). The PBGC regulation is

[15] It should be noted that the Seventh Circuit, while finding the PBGC regulation to be consistent with the statute, did not expressly accord the PBGC any deference in that statutory interpretation process. In *A-T-O, Inc. v. Pension Benefit Guaranty Corporation, supra*, the court specifically considered and rejected the deference argument. *See* 456 F.Supp. at 550-51 & 554. We recognize that some courts have upheld a PBGC claim to deference. *See Connolly v. Pension Benefit Guaranty Corporation*, 581 F.2d 729 (9th Cir. 1978), *cert. denied*, — U.S. —, 47 U.S.L.W. 3571 (Feb. 26, 1979); *In re Williamsport Milk Products Co., supra*. There is no indication that these latter cases considered the multitude of relevant factors precluding deference, however, and they are therefore unpersuasive.

inconsistent with the statutory definition of "nonforfeitable" and the Congressional schedule for gradual nullification of contractual language such as that contained in the Nachman and Concord Control plans. In this sense there are powerful indications that the PBGC regulation is contrary to the Congressional purpose and flatly wrong. *See Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973); *Dobbs v. Costle*, 559 F.2d 946, 948 (5th Cir. 1977); *Ass'n. of American Railroads v. Costle*, 562 F.2d 1310, 1318-19 (D.C. Cir. 1977). In the pension plan context, this Court recently rejected an interpretation of the Securities and Exchange Act by the SEC, stating:

> ". . . deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history."

International Brotherhood of Teamsters v. Daniel, supra, 47 U.S.L.W. at 4138 n.20. *Accord, Southeastern Community College v. Davis, supra*, 47 U.S.L.W. at 4692.

Recognition of the kind of statutory interpretation involved in the PBGC regulation produces additional reasons why it is not entitled to any weight. Deference to an agency is appropriate only when the relevant statute is unclear or susceptible of differing interpretations. *E.g., Shea v. Vialpando*, 416 U.S. 251, 262 n.11 (1974); *Green v. Ten Eyck*, 572 F.2d 1233, 1241 (8th Cir. 1978). Here, §1322(a) is unequivocal, and as discussed above in Part I of this brief, the PBGC's regulation is antithetical to its plain meaning. Furthermore, the PBGC is not entitled to deference because it has not relied on any technical expertise or experience in this area. When an agency invokes the tools of legal analysis to reach its decision, rather than calling on its technical sophistication, the resulting decision is not entitled to any particular esteem. *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960); *Jicarilla Apache Tribe v. Federal Energy Regulatory Comm'n.*,

578 F.2d 289, 292-93 (10th Cir. 1978); *Lubrizol Corp. v. Environmental Protection Agency*, 562 F.2d 807, 816-17 n.23 (D.C. Cir. 1977). As the Court stated in *Barlow v. Collins*, 397 U.S. 159, 166 (1970):

> "On the contrary, since the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by judicial application of canons of statutory construction."

The PBGC regulation is equally deficient under the other criteria identified in *National Muffler Dealers Ass'n. v. United States, supra.* This interpretation is certainly not of long-standing duration, having only been promulgated on September 22, 1975.[16] In addition to its obvious incompatibility with the statute, the regulation is also at war with other pronouncements of the PBGC. It purports to define a "nonforfeitable" benefit as one in which the participant or beneficiary has satisfied all the conditions to establish "entitlement to a benefit" except for certain specified acts or events. But since those same acts or events are taken into consideration in defining "entitlement to a benefit" in 29 C.F.R. §§2605.5(a)(3) through (5), the definition in §2605.6(a) is on its face a futile exercise in tail-chasing.

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[16] In fact, as applied to Concord Control, the PBGC regulation is not entitled to any consideration whatsoever because its application creates a problem of *double* retroactivity. In addition to being retroactive because it imposes a liability attributable to the unfunded grant of past service credits that took place when the Concord Control plan was initiated in 1956, the regulation is further retroactive because it was not adopted until after that plan was terminated on April 1, 1975. This aspect of compound retroactivity was specified by the court in *A-T-O v. Pension Benefit Guaranty Corporation, supra,* 456 F.Supp. at 554, as a reason not to accept the PBGC regulation. *See also Phillips Petroleum Co. v. Department of Energy,* 449 F.Supp. 760, 797-98 (D. Del. 1978).

To the extent that the PBGC regulation represents a refusal to apply the Title I definition of "nonforfeitable" to Title IV, it also constitutes a departure from the practice engaged in by the PBGC in its own opinion letters of utilizing Title I definitions in matters arising under Title IV.[17] As noted in *National Muffler Dealers Ass'n.*, such internal inconsistency militates strongly against acceptance of the PBGC's present position. *See also Morton v. Ruiz, supra,* 415 U.S. at 237; *Asarco, Inc. v. Environmental Protection Agency*, 578 F.2d 319, 328 (D.C. Cir. 1978).[18] And since the PBGC did not participate in drafting ERISA and there has been no subsequent Congressional action ratifying the agency interpretation, the last factors mentioned in *National Muffler Dealers Ass'n.* also sharply limit the persuasiveness of the regulation. *See generally Zuber v. Allen,* 396 U.S. 168 (1969).

Besides the criteria identified in *National Muffler Dealers Ass'n.*, two other aspects of the regulation vitiate the PBGC's claim to infallibility. The weight accorded to an administrative determination depends in part on the thoroughness evident in

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[17] For example, Letter 75-3 (April 18, 1976) incorporates the definition of "participant" from Section 3(7) of Title I to explain the scope of Title IV's requirements for payment of termination insurance premiums. Similarly, the PBGC uses the definition of "plan year" set forth in §3(39) of Title I to set the date on which Title IV premiums must be paid (Letter 75-101, August 8, 1975). The terms "participant" and "plan year" are used throughout ERISA, although their definitions are limited on their face to Title I. Thus, the PBGC apparently adopts Title I definitions for use in Title IV when that suits its purposes, but at the same time asks this Court to sanction a departure from that practice with respect to the crucial term "nonforfeitable."

[18] As pointed out above in Part IA, the PBGC Regulation is also inconsistent with the Treasury Department regulation on the meaning of "nonforfeitable." As the senior agency, with a background of experience in promulgating regulations under the Internal Revenue Code (some of which dealt with "nonforfeitable" pension benefits), the Treasury interpretation is clearly entitled to greater credence than the contradictory PBGC regulation. *See General Electric Co. v. Gilbert,* 429 U.S. 125, 144-45 (1976).

its consideration. *E.g., Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The PBGC regulation is woefully deficient when measured by this criterion. Neither the PBGC's Notice of Proposed Rulemaking, 40 Fed. Reg. 24206 (June 5, 1975), nor its notice promulgating the regulation, 40 Fed. Reg. 43509 (Sept. 22, 1975), gave any indication of the agency's reasons for concluding either that (a) Congress intended it to have the power to define "nonforfeitable," or (b) its definition could be deemed consistent with the statutory language and purpose. Such unenlightening administrative action is not entitled to deference because:

> "Since this Court can only speculate as to [its] reasons for reaching that conclusion, the mere promulgation of a regulation, without a concomitant exegesis of the statutory authority for doing so, obviously lacks 'power to persuade' as to the existence of such authority."

Adamo Wrecking Co. v. United States, 434 U.S. 275, 288 n.5 (1978); *SEC v. Sloan, supra*, 436 U.S. at 117-18.

Finally, the fact that the regulation defining "nonforfeitable" lacks the requisite statutory authority required for substantive rulemaking also undermines the compulsion of the PBGC's analysis. In *General Electric Co. v. Gilbert, supra*, 429 U.S. at 141, the Court discounted the effect of a guideline issued by the Equal Employment Opportunity Commission (which also has only limited regulatory authority) by observing:

> ". . . courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law . . . or to regulations which under the enabling statute may themselves supply the basis for imposition of liability. . . ."

In sum, a variety of factors compel judicial disapproval of the PBGC's attempt to arrogate legislative power and to rewrite the statutory language to expand its own jurisdiction.

CONCLUSION

For the reasons stated above and in the brief filed by petitioner Nachman Corporation, the judgment of the Court of Appeals should be reversed and the cause remanded for reinstatement of the judgment entered by the district court.

Respectfully submitted,

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